IS

THE BATTLE FOR RIGHT

AN IMPERATIVE DUTY?

An Answer to and Refutation of

PROFESSOR DR. RUDOLPH VON IHERING.

BY

FELIX BOAS,

DIRECTOR OF THE LANDGERICHT AT STETTIN.

"NICHT DER KAMPF GEBIEHRT DAS RECHT,
DAS RECHT IST DER FRIEDE."

Translated

(BY PERMISSION OF THE AUTHOR)

BY W. H. RATTIGAN,

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AND OF LINCOLN'S INN, BARRISTER-AT-LAW.

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CORRIGENDA.

Page 12, last line, *for* "deduce from *them*" *read* "deduce from *it*."

,, 25, top line, *for* "which *the* latter" *read* "which latter."

,, 47, Note (*a*) *refers to* "contumacious decree," *not to sub-head* "More important suits."

,, 58, fifth line from bottom, *for* "men" *read* "man."

,, 70, eleventh line from bottom, *for* "asser-" *read* "assertion."

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PREFACE.

THE recent translation by Mr. Ashworth of Dr. Rudolph von Ihering's *Der Kampf um's Recht* has made the English public familiar with a work whose size bears no proportion to the world-wide celebrity it possesses. The fact is that there is a charm, a fascination, about this remarkable book, in its style, its eloquence, and its specious reasoning, that one is apt to rise from its perusal with a feeling of wonderment that the "Battle for Right" could ever have been regarded otherwise than as a high moral duty, which each individual owes to the society in which he lives and to the State to which he belongs, and with a virtuous resolution never to shrink in the future from taking an active part in that battle should it ever happen that some right of ours, however trifling, had been violated. But it is easy to conceive how dangerous such a doctrine might become if it were ever allowed to regulate the practice of every-day life. The instinct to defend what belongs to us is common to all humanity, and is most sharply exhibited amongst the lower classes. If, then, this instinct, natural and powerful enough by itself, is once recognised to possess the obligatory character of a moral duty,—if the lower classes are educated into the belief that to fight for their smallest rights is a bounden duty that they owe to the State of which they are members,—it will become next to impossible to dwell in peace, irritation will take the place of moderation, intercourse between neighbours will become formal and strained, and each individual will find himself constantly at arms-length with those around him. This is no over-drawn picture, for in the manifold affairs of daily life small violations of strict right are continually occurring and will occur, and to advocate the principle of active resistance in such cases is to preach perpetual warfare. But as between States so between individuals, there must ever be a certain compromise of conflicting

procedure on the part of the individual for the commonwealth itself. The author at the same time glances at the conduct of nations towards one another, and criticises, from the prevailing point of view, the right of self-defence and self-redress. Seldom indeed has a juristical work evoked such sympathy, and found so many readers and followers even amongst the non-professional portion of the public. Nor was anything else to be expected from a work which claims for the life of right the most decisive energy as a moral duty, and preaches battle in the place of cowardly comfort—a battle in truth waged to the knife! We live indeed in an age when battle is the common lot; when the battle for existence, the battle of interests, is the motive which sways all minds; when battle is seemingly thought to offer not only the means for peace, but is the constant aim which is kept in view: in an age in which battle also is prized and sought after for itself. And above all, we Germans, at length awakened from a long political slumber, and become conscious of our great onward-pressing national power! Who would wish (amongst us) to undertake to oppose and attack that martial watchword? who so daring as to assert that that command of battle, whether regarded as a command of duty in a moral or factitious sense, is alike unfounded and untrue?

We venture ourselves upon the task, at the risk of being decried as a coward, and we will try and refute the learned and accomplished Professor step by step, and show how he moves hither and thither in a whole sea of contradictions, fallacies, logical chinks, and dialectical tricks, until he reaches consequences which seem, in theory as in practical life, alike impossible,

and the recognition of which the Professor himself would be the first to refuse.

It is certainly not the doctrine of the Gospel which we wish to oppose to his, that doctrine which commands us as the highest duty to bear every suffered wrong with cheerful resignation; to submit to every act of oppression with patience, and to forgive the sinner not once, nor seven times, but seventy times seven, his sins and misdeeds; that doctrine which is preached to us in such impressive words in the Sermon on the Mount: "Ye have heard that it has been said, An eye for an eye, a tooth for a tooth; but I say unto ye, Resist not evil; but whosoever smiteth thee on thy right cheek, turn to him the other also; and if any man will go to law with thee, and take away thy coat, let him have thy cloak also" (*a*). It is quite true that with such a form of morality mankind cannot subsist; it means simply to yield the field everywhere to the most godless and the most despotic, and to elevate wrong to the rulership of the world. But we can at least comprehend the religious sentiment which suggests such a command; we can admire the noble and lofty spirit which was so completely pervaded by the emptiness of this earthly life, and which despised all earthly possessions for the sake of that future life and of that only reward, which the immortal soul awaits after death in the Kingdom of Heaven. But we cannot comprehend, on the other hand, how the contrary command can be insisted upon and taught us as a "moral duty." This we do not understand, because the natural impulse of every man itself leads him to such a course of action, and because it seems to us impossible to

(*a*) Matthew, v. 38—40.

maintain that as a high moral command, or as a significant and important duty, which our own inclinations impel us to do. Nature has implanted in man the instinct of self-preservation, as the strongest and foremost of all instincts. The Professor himself assumes this as the basis of his argument (*a*). "The assertion of one's own existence," he says, "is the highest law of the whole animal world; it shows itself in every creature in the instinct of self-preservation. For mankind, however, it is a question not simply of physical life, but of moral existence, the condition of which is right. In his right, man possesses and defends his condition of moral existence." Excellent! But then the Professor continues: "The assertion of right is accordingly a duty of moral self-preservation." What a perversion of ideas! How can one maintain that which one has just called the strongest instinct indwelling in man, in the same breath as a high not-to-be-neglected moral duty! The duty of self-preservation! One may then also speak of such a duty, and point to it where the question is of the preservation of physical existence, in the one or other concrete case, where the instinct of self-preservation does not appear sufficiently strong or powerful enough in respect to other inclinations or sacrifices involved therein. We allude, for example, to the case where anyone by too great and severe a strain on his activity is in fact destroying his powers before their time, and undermining his health, although he is quite aware that he should save himself more for the sake of his family, in order to preserve their bread-winner. But need we speak of a common

(*a*) Page 17 of Mr. Ashworth's translation; and page 19 of the 5th German edition, published in 1877.

human duty of self-preservation, and elaborate the idea in ninety and more pages, that if anyone fails to fulfil this duty he must miserably perish, and not only he himself, but, if this fearful obligatory relation became general, finally also the whole race of mankind? What would we say to a man who sought to prove to us in as many pages of printed matter, that it was our bounden duty to eat, drink, and sleep if we desired to live? Would we not say, the man is not right in his mind; he mistakes the simplest things, and sees the world through a pair of colored glasses differently than anyone else with sound human reason beholds it; he converts into a high moral command what in truth is a common natural instinct of man? Precisely so is it with our Professor. It is the chief piece of legerdemain which he accomplishes in his work, that what was immediately before a powerful instinct of man, becomes now, precisely because it is so, transformed suddenly by a turn of speech into a high moral duty, and it is then of course an easy matter to point out what disadvantages and evils the neglect of such a duty must produce.

Easy, very easy, but also superfluous, and very superfluous. For if even in hundreds and thousands of cases the individual omits for some reason or another to assert his right, the instinct to enforce his right, to resist wrong, to demand satisfaction for his violated right, remains nevertheless always powerful in him; and should it happen in the case of a particular individual that this instinct is wholly subordinated to other sentiments, like those perhaps of a religious character, in the case of mankind in general it will never cease to exist, or to be strong and effective; for it is a question of self-

preservation, of the very existence of mankind. But just as it would be ridiculous to assert that if a man fasts one day, takes no food or drink, or foregoes sleep for a short time, he thereby incurs a risk to his physical existence; or that, if such a fast were general, as for example in regard to fast days enjoined by religion, a general risk for the entire community would thereby result; so equally is the assertion unwarrantable that the non-enforcement of a right in an individual case, or in certain cases, would produce injuries and disadvantages, as well as great risks for the moral prolongation of existence of the individual in reference to nations and political communities.

This argument is alone sufficient to cut away the ground on which rests the whole work, put forth with such intrepid emphasis, and those two principal propositions of the same, namely, "the battle for right is a duty which the entitled person owes to himself, and at the same time to the commonwealth;" and it would be useless to waste another word over it were it not for the fact that in the arguments of the Professor himself, the most glaring contradictions and the boldest flights of fancy occur, which seem not only to deserve, but to call for exposure. To enter more fully into this refutation will now be our task.

And here, at the very threshold, and in the beginning of the work, we meet with two masterpieces of language. "In battle shalt thou find thy right" is the motto of the work, and in the opening page we read: "In the idea of right the contrasts of battle and peace are joined together, peace as the aim of right, battle as the means thereto, both equally involved in the general idea and

inseparable from it" (*a*). What meaning, then, does the word "battle" signify to the Professor? Immediately after the passage just cited the author proceeds: "It might, on the other hand, be objected, that battle or quarrel is precisely that which right wishes to prevent" (*b*). Here it seems that he regards every quarrel as a battle, and he remarks a little above that, "every definition of a law-institute, *i. e.*, of ownership or obligation, is necessarily twofold: it indicates the purpose which that institute serves, and at the same time the means how to prosecute it. The means, however, whatever form or shape it may assume, always reduces itself to a battle against wrong." He calls, therefore, every law-suit, every process, a battle. But, Mr. Professor, learning and eloquence, no matter how vast they may be, confer no right to pervert the sense of the words of a language—to do violence to their meaning. Nevertheless, like a skilful fencer, you have, by a rapid turn of the hand, substituted a duty of self-preservation for the instinct of self-preservation, and thus "battle" (*Kampf*), and "dispute" (*Streit*), have one and the same meaning for you. Every dispute, every quarrel, is, according to you, a battle, and yet who, that is acquainted with the German language, does not know that while, according to the customary signification of the words, every battle is a quarrel, it is by no means

(*a*) This passage has been altered by Ihering in the later editions of his work, which now opens as follows: "The aim of right is peace, the means thereto battle; so long as right must fear an attack on the part of wrong,—and this will be the case until the end of all things—so long will battle be its portion." Ashworth's translation.

(*b*) This passage is omitted in the 5th and 6th editions.

the case that every quarrel is a battle? Very true that battle is a means to settle a quarrel, or to end it; but this means consists in the application of force against force, of power against power: both parties contend with one another for the victory, without the intervention of a third party as judge. Battle is, nevertheless, not the only means of settling a quarrel. Apart from compromises and amicable adjustments, which exclude battle and yet lead to peace, there is still, in the case of a law-suit, another and far different means, namely, the judicial decision, to which the process leads at the conclusion of a previous and regulated procedure. The judicial decree, the result, the end, and the aim of processual proceedings is no battle, but, quite conversely, that which is sought after with the view of avoiding and guarding against battle. Process and judgment exclude rather than constitute a battle for right. And just as in the German language, so also in other languages, the expressions "battle" and "dispute" are not identical; in the Latin language PUGNA signifies battle, and LIS a dispute: no Roman would have thought of describing a LIS as a PUGNA.

But, after all, what matters an incorrect expression, or an incorrect signification? May we not idealise a law-suit in a metaphorical and figurative sense as a battle? Certainly; and we would be the last to object to such an expression simply because it was badly or inappropriately chosen. But you, Mr. Professor, have in reality the idea of a law-suit as if it were a real battle; with you this false and erroneous notion governs your whole view of the essence of right and of the life of right of the nation; you deduce from them the most serious consequences; with you

that notion pervades your whole work from the beginning to the end, as your motto itself shows, with which you have entitled it: the battle for right. You say: "It (*i.e.*, the battle for the concrete right) is invoked by the violation or withholding of this right. Since no right, neither that of the individual, nor that of the nation, is protected from this danger, it follows therefore that this battle may be repeated in every sphere of right: in the lowlands of private law as well as in the highlands of political and international law. *War, rebellion, revolution, the so-called lynch-law, the club law and combat of the middle ages, and the latest survival of the latter in the present age, the duel,—finally, the right of self-defence and our modern civil process,—what are they, despite all distinctions in the object of dispute and in the stake, in the forms and dimensions of the battle, but forms and scenes of the same drama, 'The battle for right?'"* (*a*). So then, Mr. Professor, according to your system, is the decision by a judicial judgment really synonymous with the decision of a dispute by the sword, or by the club? We had hitherto always thought, and we still think, that neither in war, nor in rebellion, nor in revolution, nor in the popular justice exacted by lynch-law, nor in the club law and combat of the middle ages, nor even in the modern duel, the right decides who shall be the victor or conqueror. We conceive that in all these struggles force and might, or superior prowess and skill, alone and exclusively determine the victory, and that the question of right, although it may have been the motive or occasion of the struggle, is wholly left

(*a*) Page 13, 5th German edition; and page 12, Mr. Ashworth's translation.

out of the game once the struggle itself has been kindled. But in a civil process, however erroneous or faulty the judgment frequently may be, the right, and that alone, furnishes the basis of decision. And because this is so, a civil process is not simply another form of the battle of parties, but according to its nature it is the distinct antithesis of this: it is rather the avoidance of and substitution for a battle, which does not inquire into right by means of a judicial decision, based exclusively upon right. It is precisely for this reason, Mr. Professor of Jurisprudence, that all civilized nations have introduced civil process for the determination of the law-suits of individuals, and no organised state can exist where that determination is left to the point of the sword of the parties.

This, in truth, is all so clear and simple that it needed no words to express it; but when a renowned Professor of legal lore in his lectures and writings teaches the distinct contrary, when he finds only a too ready sympathy for this new and unheard-of doctrine of his amongst both laymen and lawyers, then certainly necessity compels us to oppose these views with all the vigour of which language is capable, in order that they might not transfuse themselves into the flesh and blood of the nation, and here work incalculable evil. For unhappily we see at the present day, only too clearly, for instance, in the lower strata of the population, the prevailing tendency to obtain immediate satisfaction for an imagined violated right, and to revenge the injured right by a knife thrust at the opponent. The command "In battle shalt thou find thy right" leads us back on the straight road to the grossest barbarism.

The Professor may constantly protest to us that he

has not understood the word "battle" as if it signifies nothing else than the assertion and enforcement of right in a regulated procedure; but this is simply not true, as the above-quoted passage proves, in which a process is placed on the same footing as war, rebellion, the club law and the duel, and as we shall see still more plainly presently. No, Mr. Professor, the mass of the people amongst whom you have flung that expression will trouble itself little with your closer reasons and exposition; it will cling rather to that simple maxim "In battle shalt thou find thy right," and will naturally understand by battle only that which language has connected with it as the traditional sense of the word—the battle of force with force.

Once more, then, *not* in battle shalt thou find thy right! Battle and right are irreconcileable contrasts, which so far from agreeing with one another exclude each other. Thus, then, from no point of view is that true, Mr. Professor, which you so calmly assert as your fundamental principle in the beginning of your work: "In the idea of right the contrasts of battle and peace are joined together,—peace as the aim, battle as the means, of right, both equally involved in the general idea and inseparable from it." Peace may always be the aim of every battle, or at least its result; but that this peace, effected by means of battle, re-establishes the violated right and secures amends to the injured party, that is, in truth, an assertion which the logic of facts directly contradicts (*a*). For how will you dare to assert that in a war, a rebellion, a revolution, a duel or a combat, it is always he who was violated in his right, or who felt himself perhaps to be so, who gains the

(*a*) Lit. Slaps in the face.

victory from it? If perchance the victor has felled his opponent to the ground, has killed him in short, then certainly peace follows upon the battle; but a peace dictated by the conqueror, and in no way by right, or the peace of the cemetery, when no opponent survives, in which case there is at all events no further scope for a jural relation between the parties. Let us take again a duel; this, according to you, Mr. Professor, prevailing survival of the club law and combat, but, according to our view, disgraceful practice of modern times, condemned by every penal code; here suppose the injured man challenges, and the person challenged kills him whom he has previously wronged. There is peace there, the peace of death, but where does the right abide? Has the battle restored the violated right? Has it secured suitable amends to the wounded honour of the deceased?

But you, Mr. Professor, cannot in the least conceive the life of right of a nation without battle. To you battle is the condition-precedent for the origin of abstract rights. To you it is the necessary condition for the maintenance of right in its existing state, of the existing concrete right. Every condition of right, every disposition of right, is to you nothing else than a combination of battle and peace. This, in fact, is a moral aspect of the world to which we are not able to accord our assent, and one which teaches a conception of the life of right of a nation which in no way corresponds with reality.

Let us glance now, in the first place, from the origin of individual rules and institutes of right, from the growth of abstract principles of right, and consider the existing conditions of right as a given and extant whole. Here we meet with millions and millions of individual concrete

jural relations. And not only so but almost the whole surface of the earth's crust, so far as it has been brought under cultivation, is found in the possession of a great and innumerable multitude of individuals, almost every immovable subject which is fit for the use and service of man has its distinct lord and owner. And these rights of ownership, which number many hundreds and millions, are nevertheless recognised and respected in the vast majority of cases by every other person. The disturbances which occur, whether in the form of hindrances in the use or enjoyment, or in the withholding or forcible taking away of particular goods or parcels of land, constitute an ever-diminishing small number, scarcely worthy of consideration, in comparison with the multitude of existing jural relations. Again, several thousands of contracts of all kinds are daily entered into, debt-relations and legal obligations of every description arise without number: the whole enormous trade of the civilized world is based upon nothing but individual contracts and upon the supposition of all the parties concerned therein, that the contracts will be fulfilled, and the debts discharged on due dates. What signifies, in the face of all this, the cases, whose number is scarcely worth mentioning, in which truth and faith are violated, the pledged word is broken, or the promise is unfulfilled? Let us glance again at the personal intercourse of men with each other. Hundreds and millions of them live more or less closely packed together on the soil of our good mother earth, each having his own special interests, aims, wishes and inclinations; but, despite the numerous points of contact between them, how extraordinarily rare are acts of violence by one person against another, even if all murders, bodily inju-

ries, misdeeds and dishonourable actions be reckoned together! Do not most family relations moreover exist without any disturbance in the rights established thereby? Are not partitions of land and divisions of other goods of all kinds effected, in the vast majority of cases, by amicable means?

To sum up, the disturbances or invasions of right, taken as a whole, represent comparatively so small an aggregate with reference to the vast and incalculable number of existing jural relations, that even if they were a hundred or a thousand fold more, the life of right of the nation would in no way be endangered or called into question. Right, however—and this it is which you, Mr. Professor, completely fail to comprehend—is asserted and maintained also in all cases where a disturbance does not confront it; every exercise of a right, even when it is undisputed and fully recognized, is an assertion and enforcement of the same; and just because it is in itself, and apart from the interests of the entitled person, a matter of such small importance, without any weight or any serious significance, whether the entitled person in the relatively small number of cases of disputed jural relations, no matter whether arising out of arbitrary and intentional violations of right or not, defends his right and demands satisfaction and compensation, in order to the re-establishment of his former right; or whether he prosecutes his right, and for that purpose enters the lists; or whether, as you, Mr. Professor, express it, he battles for it or relinquishes his right; no common danger arises even in the last-named case for the life of right of the nation. But be it understood that this can only be said of the civil law satisfaction, and that the matter stands in a very dif-

ferent light with respect to the punishments of the criminal law, of which more anon. The peace of right exists, therefore, in the civilized states of the world substantially without any battle, and for this reason, that the disturbances which are said to produce the so-called battle are, considered as a whole, very rare, and those essentially not influential; if it were otherwise, if the disturbances of right were the rule, and the recognition of the same the exception, no organized State could subsist, and anarchy would everywhere prevail.

What then is the reason why, in an organized State, the disturbances of right do not obtain the upper hand, and the peace of right maintains itself as the normal condition of the life of right of a nation?

It is surely not because every violation of right, or at all events in the great majority of cases, is in reality rigorously prosecuted. As a matter of fact this is not so, and abundant instances of such violations continually occur, which the aggrieved person considers for some reason or other are not worth his while to prosecute. The real reason lies deeper, it is ingrained in every human breast, and coincides with the essence and the innermost character of right itself. Let us dwell on this subject for a moment.

Why, for instance, do jural relations everywhere arise and subsist amongst men? Why do an extended life of right and a life of commerce develope themselves amongst them?

The thing appears simple enough when looked at from an impartial and unprejudiced point of view.

The individual man by himself feels himself incapable of permanently satisfying even his necessary requirements, or of maintaining and guaranteeing his existence

without the co-operation of his fellow men: he would very soon irretrievably perish in battling against the elements, and against the other creatures of the earth. Thus he is driven, by the strongest of all human instincts, that of self-preservation, to unite himself with others of his own species for the sake of his own self-preservation, to seek their help and support, and to utilize the powers of his fellow men for himself; and like one so another, and so every one. This leads necessarily to a continual interchange of reciprocal performances. On the other hand, every individual strives on his part to reduce the services required from him for the benefit of his associates to the utmost possible extent, while he demands the highest standard of performance from them. There thus arises amongst men a constant and never-ending quarrel of interests, which would lead, and must do so, to an interminable struggle, the BELLUM OMNIUM CONTRA OMNES, were it not that the higher and stronger interest of guaranteed existence, which teaches men the necessity of reciprocal support and help, compelled them to seek and discover in the place of that bloody struggle for the goods of the earth and the products of human industry, a peaceful and amicably-settled compromise of conflicting interests, without battle of any kind.

And this form of compromise, which has existed in all civilized nations long before the period of authentic history, and which must necessarily arise in the earliest beginnings of all culture and civilization, partly by the force of usage and custom, partly by reason of express principles and rules, whether these may have been prescribed by individual rulers or chiefs or by popular assemblies; this compromise whose pre-historic elements have everywhere been the mutual recognition and respect

of possession and ownership, of the sacredness of contracts, and of the inviolability of the person in some form or other; this compromise, whose particular conditions constantly change and transform themselves according to the necessities of commercial and social intercourse in just the same manner, by force of usage or custom, or by reason of express principles and agreements; this compromise, finally, which, in order to be effectual, is concluded and maintained not simply by the individual members of a large community, but necessarily by the whole totality of such members, in order to avoid a ceaseless struggle amongst individuals, and in the interest of maintaining and guaranteeing the existence of each one; THIS COMPROMISE FORMS THE FOUNDATION OF RIGHT, AND IS RIGHT (*a*).

The construction of objective rules of right and the origin of subjective titles of right do not, however, by any means follow the same course, nor are they by any means contemporaneous; the former do not always precede the latter, but frequently develope themselves even still quite gradually from the existence of a large number of similarly formed subjective titles. In this manner, for instance, in historical times, a multitude of important and most significant law institutes connected with the province of commercial, maritime, and bills of exchange law have arisen, and in like manner also in the oldest, pre-historical, and, if one will, pre-political age, the first foundations of objective rules of right have formed and developed themselves amongst most nations. The subjective titles, maintained by the interest of the individual in their continuance and in

(*a*) See further on this subject in the author's work, "The State and Civil Society." Berlin, 1870.

the avoidance of a forcible struggle without the intervention of any political force, were earlier in point of date, while the construction of objective rules of right out of that host of individual concrete jural relations was later, although at the present day, under the influence of political legislation, the converse process of construction is the rule.

Thus this process of development of objective right takes place, partly in a conscious and partly in an unconscious creation of the popular mind, and is occasioned and called forth by the ever-varying needs of the intercourse of individuals within the community. *The interest and the needs of the individual constitute the primary cause of the building up of right.* And if we agree with the Professor that the individual rule of right is not the expression of the truth of right existing in the conscience of the nation, which, in fact, breaks ground slowly and gradually by the power of conviction, for the reason that we cannot generally realise to our minds anything intelligible as to what is meant by the *truth* of a law institute or of a rule of right, we are, nevertheless, very little disposed to accept his view that battle is the proper source of right, or that battle builds and creates right. In our opinion right is rather the compromise of conflicting interests, which aims at the avoidance of battle, no matter whether this compromise may have actually resulted in the one or other case after an actual struggle. But the object of a battle is neither a compromise nor right, but first, and above all, victory; the person waging it strives by its means to gain power and mastery,—mastery over the persons whom he can subdue under himself,—mastery over the things which he lusts after, and which he can appropriate to

himself. Moreover, the conqueror in the battle solves, by his own decisive will, the conflict of interests, and establishes what shall be right. But, however numerous and fierce may have been the battles for the political and civil rights of individuals (*i. e.*, power), or of particular classes of society which the political life of a nation may have witnessed, the Professor completely errs when he pre-supposes a battle of that kind to have been the rule and the proper fundamental condition for the formation of civil private right.

The Professor says (*a*): "All the great successes that the history of right can chronicle, the abolition of slavery, of villeinage, the freedom of land-ownership, of trade, of religious faith, and the like, have all been won in this fashion after the most desperate struggle, which has often lasted centuries, and not unfrequently streams of blood, while everywhere down-trodden rights, have marked the road which right has travelled on its way to victory." But, surely, in the first place, Mr. Professor, all those institutes of right that you here mention, stand on the border between public and private civil right; they are institutions which are more or less attached to the political constitution of the nation, and for this reason are little suited to mark the course of development which private civil right, properly so called, has taken. The right of religious freedom especially stands in the closest connection with the former, and generally with the public state-life, because the religious influence of the mind is employed as a means of political power.

Of all the other highly-important institutions of civil right, of the right of ownership, so far as you do not

(*a*) Page 8 of the 5th German edition; and page 7 of Mr. Ashworth's translation.

comprehend it under the right of freedom of land-ownership, of the numerous and varied rights of usufruct in things, and of the right of pledge, of the right of contract as a whole in its vast and mighty scope, of the right of succession, of marriage and family right, and of so many other institutions of civil right, including that of process, almost all of which have a past history of more than a thousand years of development, you do not speak, because presumably you would find it impossible to bring their growth and their course of development under the notion of a battle, unless you were prepared to conceive all growth and development itself as a battle; but a battle it is not in the sense intended by you, or else you again merely play with words when you speak at one time of an actual battle, and then continue: "Thus, right, in its historical movement, presents to us the picture of seeking, struggling, BATTLING, in short, toilsome exertion," where you place "BATTLING", as synonymous with "seeking, struggling, and exertion" (*a*).

But to return now to your examples.

In the first place, the abolition of slavery. The history of Greece and Rome, the ancient civilized states of Europe, informs us in truth opportunely of a rising of the Helots in Sparta, of the so-called Slave War, and of other slave insurrections against Rome during the period of the Republic; but all these insurrections were quickly suppressed, and exercised no influence upon the transformation of the existing jural relations affecting slavery. In other respects we know nothing of the great struggles which aimed at the abolition of ancient

(*a*) Page 9 of the 5th German edition; and page 8, Mr. Ashworth's translation.

slavery, which the latter vanished rather in Europe—and of this you nevertheless speak first of all, Mr. Professor—gradually in the course of the early part of the Middle Ages under the influence of Christianity; it died out itself gradually, by converting itself into villeinage and bond-service. In modern times we see, beyond the ocean, in America and the West Indies, a new, more grievous and worse form of slavery arise—the negro slavery. It was introduced by the necessity of obtaining suitable means of labour for the torrid zone, without meeting with any opposition at its introduction which it first had to conquer in battle; and this, surely, was also a new development of an institute of right. Here, also, there were disconnected, quickly-suppressed risings of slaves; but here, also, with the exception perhaps of a rising in Cuba, no struggle on the part of the slaves against their masters for the abolition of slavery ever took place. Certainly, a terrible war, carried on for some years, was lately waged in the North American Republic between the slave and non-slave States, and the result of this war was the total abolition of slavery throughout the States of the Union. But the object of this war, commenced by the slave States, and, in fact, by the slave proprietors, was not so much to secure the abolition of slavery as, on the contrary, to effect a separation of the slave States from the Union, in order to prevent thereby a future, and perhaps possible, abolition of slavery; and the aim of those who were arrayed on the opposite side was above all to maintain the existence of the Union. The abolition of slavery was not at first a real object of that war, but only an excuse for war; the contested victory made it possible to introduce the measure for the abolition of the insti-

tution; *but this happened in the general interests of civilization, and no struggle took place between the parties concerned for the sake of their rights, that is to say, between the slaves and their masters!*

In the next place, with regard to the abolition of villeinage, we are not aware that the demand for its abolition anywhere, or at any time, gave rise to a struggle, or that this abolition was obtained or contested by means of battle, *on the part of the villeins themselves.* In England, all personal relations of unfreedom vanished by slow degrees in the course of centuries, without producing any active dispute. On the Continent, indeed, these relations survived a while longer; but in France they were abolished on the memorable night of the 4th August, in the year 1789, without the trace of a struggle, *and, in fact, on the proposal of the interested persons themselves.* In Prussia, Frederick the Great had already abolished villeinage before the French Revolution, and the Edict of 1807 extinguished the last survival of fief-holdings, but no battle either preceded or followed it. In Russia, the institution of serfdom flourished down to the most recent period in full vigour; it was deeply-rooted in the popular conscience of right, it had a far-reaching and powerful influence, and the most important rights of property were connected with it. But as soon as the Emperor Alexander, the sole possessor of political power, was thoroughly convinced that the abolition of the institution, however difficult the carrying out of the measure was in matters of detail, was necessary in the general interests of the country, he simply promulgated an Ordinance to that effect, and no battle either preceded this Ordinance with the view of enforcing

the abolition, nor did a battle follow it on the part of the possessors of serfs who were injured in their interests with the view of opposing the introduction of the measure. The Professor simply romances when he speaks of the most desperate struggles lasting over centuries, by means of which the abolition of villeinage was gained. Let him give us historical dates and facts, but no flourishes.

In the third place, the freedom of the ownership of land, another of the great successes that the history of right has to chronicle, and which must first be gained by means of the most desperate struggle! But you, Mr. Professor, who have yourself chosen the Roman Law as your special study, ought it then to be entirely unknown to you that that important right, the freedom of the ownership of land, prevailed in Rome from the most ancient times, and that it was never assailed down to the last, therefore, for more than a thousand years consecutively, and that the principle was still admitted in the Justinian Digest? But you speak also of another and later period. Well, then, in the course of the Middle Ages and of the following period, numerous restrictions, corresponding to the economical relations and commercial needs of the time, with respect to the alienation, pledging and partition of landed property, were established in the interest of individuals entitled thereto, the abrogation of which, as the economical relations changed in character, was desired in the general interests of the cultivation of the soil, and was opposed. But when and where did the possessors who were subject to these restrictions combine together for a struggle, to compel an abrogation thereof by force? When and where did the entitled persons,

when the conviction of the necessity of that abrogation in the interest of the general cultivation of the land had once appeared, offer any active opposition to the efforts of the supreme power, which were directed to that end? Facts, facts, Mr. Professor! Is there in the great French Revolution, which certainly witnessed enough of political struggles, a more glorious act than that already mentioned of the memorable night of the 4th of August, in which all those rights, and many other important and weighty ones with them, were nobly sacrificed at the altar of the Fatherland by the entitled persons themselves, or by their representatives? Or was the remarkable agrarian legislation of Prussia, which began with the Edict of the year 1809, and has since continued uninterruptedly down to the most recent times, by the abrogation of existing as well as by the introduction of new restrictions in the interests of the cultivation of the land, forced by the struggles of the persons interested, or was its passage into law met by the opposition of those who were threatened in their interests?

Finally, in the fourth place, the freedom of trade; and here again, we ask, did it not exist in Rome at all times and in every age? Was it not at a much later period that the numerous restrictions in this matter were introduced, and these chiefly in connection with public political regulations? Had not the guilds and corporations their proper roots in these restrictions; and where the public political life took another direction than that which it assumed on the continent of Europe, as, for instance, in England and in North America, did not the restrictions gradually fall into desuetude of themselves without any struggle whatever? Did the per-

sons whose interests were threatened thereby seek in any way to resist the change? In politically-divided Germany, however, the proper birth-place of these restrictions, was it because the corporations opposed their abrogation, and the power and influence of these corporations were too great for one to dare to offend them by such a measure, or simply because the sovereign power deemed it better in the general interests of the community to preserve the existing regulations, that these restrictions were maintained for a somewhat longer period? Do not, even at the present day, numerous professional restrictions continue to exist upon the same ground, and perhaps with the approval of the Professor himself; for instance, in regard to advocacy and the profession of chemists, and the like? It certainly required time before the conviction of the general utility of freedom of trade, and of the pernicious effect of most of the existing restrictions on trade, gained sufficient ascendancy, or had won over the sovereign power; and for that purpose continued efforts and exertions, in writings and speeches, were requisite. If the Professor calls this controversy of opinion a battle of right he may do so; but a battle in the sense in which he uses the expression—a battle of interested persons with and against each other—in which might turns the scale of the opposing forces, it is assuredly not.

And here we revert again to the more general point of view. It is true that where the question is one of public political right, for power and mastery in the State or in the political community, for the privilege of participating in the administration and regulation of public affairs, there often a violent struggle of different

interests, of different conditions and classes of society, and business, is kindled, which leads at times to the most bloody encounters; in this struggle might measures itself against might; it is a battle of force against force, for it is for the sake of power that it is waged, and the conqueror establishes right, not according to what appears just to him, but what is best calculated to promote the stability, security, and extension of his power. Such struggles for political constitution are shown to us in the history of Athens, of Rome, of the Middle Ages, and of modern times in abundance. It is also the same sort of struggle which is still carried on between the State and the Church with respect to their mutual relations, for both contend for the mastery, and the victory can only be settled by a battle of force against force. The case is quite different, however, with respect to the institutions of civil right. In these the question is not of power and mastery, but of the protection of the person and of possession; of the promotion and protection of mutual intercourse in the interests of self-preservation, and of the welfare of each individual, and in order that a perpetual warfare might not be carried on by all against all.

It is, therefore, a compromise of conflicting interests, which is sought for with the view of avoiding a struggle; and a dispute in regard to the reform and remodelling of institutions of civil right concerns itself, therefore, for the most part, with the thought of what principles are most conformable and suitable to the existing relations and commercial needs, most salutary to the general interests, and best calculated to promote the welfare and happiness of the entire community. Every legislative assembly can teach the Professor this much.

The individuals who are threatened in their separate interests seek mostly an underhand and clandestine form of agitation, a secret stirring up of public feeling, but scarcely ever an open struggle.

One point must be carefully borne in mind. Every injury to or violation of an existing concrete right by means of legislation is always also, in the first instance, an injury to the general interests of the State, for it endangers the security of the condition of right; it arouses discontent in the minds of the injured persons, and impairs, when it is a question of the rights of property, their prosperity, and thereby, at the same time, in a more or less degree, the prosperity of the nation, which is itself composed of the totality of individuals. Hence a drastic legislative measure of that kind is only resorted to when the benefits to accrue therefrom for the common weal far outweigh those disadvantages to which reference has just been made, and when this conviction is completely felt, as well by the popular mind as by the sovereign legislative power itself, which is often only the case after the lapse of a long period of time.

But wherever and in whatsoever manner the threatened individual interests may be put on their defence, one thing is quite certain, that in such cases there is never any question of a battle of individual interests against other individual interests, and for the purpose of obtaining mastery over each other, but simply always of the yielding of individual interests in favour of the common interests of the nation, so far as the former are not reconcileable with the latter. This one ought not to call a battle for right on the part of the persons interested, which is rather only to be understood of a battle

of different individual interests against each other, not embracing, however, that fundamental principle of every civilized State, that the separate interests of the individual have to yield and subordinate themselves to the welfare of the State—that principle which has found expression in the words SALUS REIPUBLICÆ SUPREMA LEX ESTO! For on this principle rests the whole system of the State.

But you, Mr. Professor, say on the contrary (*a*): "The battle then reaches the greatest degree of intensity when the interests have assumed the form of acquired rights. Here two parties stand in opposition to each other, of which each carries on its banner the sanctity of right; the one that of historical right, the right of the past, the other that of the ever-growing and rejuvenescent right, the eternal primeval right of mankind TO BE—an instance of the conflict of the idea of right with itself, which, in reference to the subjects who have staked their whole strength and their whole existence for their conviction, and have finally succumbed to the sentence of the ordeal of history, has something truly tragical." Permit us, in the first place, to make the observation, that "*the eternal primeval right of mankind to be*," is an empty, incomprehensible phrase, which offers absolutely nothing for reflection, for it is not only mankind that exists and undergoes change, since that is the quality of all things. But you will not speak of inanimate things, or of the rest of the animal world; they have a right to be; and what is it that is generally meant, what do you understand by the phrase, man has a right to be, to

(*a*) Page 8 of the 5th German edition; and page 7 of Mr. Ashworth's translation.

form, and to change himself? What entitles you to call and designate that as a right which is simply a quality of both men and things alike? And for such a primeval right, an empty right without substance, and without any conceivable importance, men battle, nay, battle with the greatest degree of intensity! Strange creatures these men! But then, and more particularly, Mr. Professor, when you speak elsewhere in your work of a battle for right, you understand thereby—this is in fact the fundamental idea running through your work like a red thread—that each of the contending parties battles not for right in general, but for his right—for the right that is said to be his, which he seeks to gain for himself—in short, for his own personal right. But all the examples chosen by you to support this proposition are unsuitable. Not slaves, not serfs, have fought (or let us say, more correctly, contended) for the abolition of slavery; not possessors of land restricted in their right of disposition for the freedom of ownership; not unincorporated artisans or journeymen traders for the freedom of trade: all these have contributed little or nothing for those objects, and their actual power would have been too weak either to subvert or to trample under foot the rights of their opponents. Those who waged war against those historical rights had absolutely no direct concern with them; nor did they endeavour to win for themselves any other right—not even the eternal primeval right to be! What they fought and contended for was exclusively the general welfare—the interests of the community at large. How can, how dare, one speak here of a battle for right! If that which they contended for involved or resulted in a

change of the jural relations of others, their own rights and jural relations would nevertheless not be affected in the least! For this reason the battle that they fought was one for the welfare of the State, which certainly also produced a change of jural relations, but was no battle for right.

"Right," you continue (*a*), "can only become rejuvenescent by clearing away its own past." Therefore every progressive and further development of abstract right, or of a rule of right, involves, according to you, the destruction of all existing concrete jural relations which were subject to the former prevailing rule! What a vandalistic view of right! what a positive untruth! "A concrete right that claims for itself an unlimited, therefore perpetual, existence, because it has once arisen, is the child that lifts its arm against its own mother" (*b*). No, it by no means lifts its arm against the mother, for the continuance of existing concrete jural relations may very well be reconcileable with the laying down of rules of right, which aim exclusively at the prevention of similar concrete rights arising in the future. With the most perfect reason, however, every concrete right claims perpetual existence, or, rather plainly and clearly expressed, so long as it exists, recognition and currency; this, in truth, is just the peculiar essence of right. And can it be wholly unknown to you, Mr. Professor, that, according to rule, the already acquired and existing concrete rights are not affected by a change in the provisions of

(*a*) Page 8 of the 5th German edition; and page 7 of Mr. Ashworth's translation.

(*b*) Page 9 of 5th German edition; and pages 7—8 of Mr. Ashworth's translation.

the law in question? that the contrary only happens when the possibility of clearing away of other future conditions of right scarcely otherwise exists, or when the welfare of the country imperatively demands the violation also of rights already acquired? that finally, when it is a case of the trampling down of those rights, is it not a question, at least in most instances, of awarding just compensation to the injured persons? *The continuous development of abstract right, or of a rule of right, has properly no influence upon the continuation of existing rights.* But you say, Mr. Professor (*a*), "it (*i. e.*, the concrete right) scoffs at the idea of right, while it yet itself appeals to it" (namely, in reference to its continuation), and you add, by way of conclusion, "for the idea of right is eternal being, but the acquired must yield to the new being—

Everything that comes into existence
Deserves to perish again."

How many contradictions in so few words! Is it then because eternal existence is a quality of all things that it must constitute the idea of right? We certainly imagined that the idea, the essence, the notion of right, was to be sought for in that which characteristically distinguished it from other things, and which conferred its peculiarity upon it. You, Sir, teach us better: the idea of right lies in that which it has in common with all other things! Wonderful logic! And was it not you who said at the beginning of your work (*b*): "The expression right notoriously embraces a twofold sense—

(*a*) Page 9 of 5th German edition; and page 8 of Mr. Ashworth's translation.

(*b*) Page 4 of the 5th German edition, with a slightly altered text; and page 4 of Mr. Ashworth's translation.

that of right in the objective and in the subjective sense. Under the former we understand the sum total of the prevailing principles of law, the legal regulation of life; under the latter the reduction of the abstract rule to a concrete investiture of right of the person"? But if therefore the abstract and concrete right are two absolutely different things, how come you then, when you speak of the existence of right, to throw both notions at once into the same pot? Have they both, then, not their own special laws of existence, *i. e.*, of origin and extinction, and do not your pupils learn this in college tolerably early in their course of legal study? Or is it because a concrete right asserts a claim to perpetual existence that it is also an eternal right? Does not a right of ownership cease by alienation or the destruction of the thing, a claim by payment or discharge of that which is due? But just as the cancellation of a concrete right, despite its claim to eternal existence, does not alter the continued existence of the abstract rule of right, so the cancellation of the latter does not hinder or impede the continued existence of the concrete right. Once more, laws have properly no retrospective operation.

We have shown that in the idea of right battle forms no inseparable necessary element; that rather, on the contrary, right, and particularly civil right, which is mainly in question here, aims at the avoidance of battle by a pre-eminently peaceful compromise of conflicting interests, and that this compromise is everywhere effected by the human instinct of self-preservation as an absolutely necessary expedient, since men find themselves compelled to rely on the mutual support of each other, and they could not continue to live together without it.

But it follows from this that *the universal recognition of existing concrete rights in every civil society is, as is actually the case, the normal and proper condition, while the violation of the same forms the exception.* This happens not because every individual remains conscious at every moment of his life of that connexion with his fellow man; the individual sees rather that his self-preservation and existence are not endangered by his occasional acts of invasion upon the rights of others, to which his selfishness and passion impel him, and thus greed gains the victory over the sentiment of right indwelling within him. In opposition to these individuals the rest of society is compelled, for the sake of securing its existence, which is only possible by maintaining existing conditions of right, to unite and with its united superior force to ward off and overcome the attacks of individuals upon legal order. This is the political organisation of society, whose first and principal task, next to that of procuring the safety of its individual members, is the protection of right. It suffices for the existence of such an organised judicial power that there should be the possibility of enforcing right in every case of its infraction, as in fact has been conceded in every civilized State from the earliest times down to the present day, the *possibility* of obtaining satisfaction or compensation to the injured person by the help of the strong arm of judicial power; in short, to be able to enforce a recognition of his right, as well as by a constantly growing consciousness of this possibility in every individual to prevent the frequency and the increase of violations of right, to confine the attacks upon the rights of others within narrow limits, and to secure the existence of legal order, since it is precisely in this direction that the efforts of the greatest

part of society are directed, and it is only for the support and carrying out of these efforts that the organisation of judicial power on the part of the State is required. The *actual* enforcement of right in every individual case of its infraction is not at all needed for the above purpose; it may rather be left to the discretion of each one, without any danger to the commonwealth, whether and how far he will assert his violated right, or whether he will abandon it. *Thus the assertion of a personal right is for this reason just as little a duty towards the commonwealth as it is towards the entitled person himself.*

So much on general grounds. It remains for us to consider some of the more special arguments and conclusions of the Professor, which no less exhibit the confusion of fallacies and contradictions than the views and assertions that have already been criticised.

The Professor accordingly writes further on in support of his doctrine of the battle for right: "With the violation of right every entitled person is met by the question, whether he means to assert it, to offer resistance to his opponent, and therefore to do battle, or whether, in order to avoid doing so, he will abandon it? no one interferes with his resolution. Whatever he may resolve, in either case he is bound to make some sacrifice; in the one case he sacrifices right to peace, in the other peace to right" (*a*). The truth of both these propositions must be challenged.

Let us in the first place examine more closely the whole series of violations of right.

And foremost of all there is a large mass of violations of right of individual private persons, which in all civi-

(*a*) Page 15 of the 5th German edition; and pages 13—14 of Mr. Ashworth's translation.

lized States, or at least in all modern States, falls not only under the point of view of the Civil, but also at the same time of the Criminal law. To this category belong the great majority of intentional violations of right, in reference to which, indeed, the Professor more especially bases his theory that the battle for right is a duty. He says (*a*): "But every wrong is not arbitrariness, *i. e.*, resistance to the idea of right. The possessor of a thing that belongs to me, and of which he considers himself the owner, does not deny in my person the idea of ownership, on the contrary, he appeals to it for himself. The dispute between us twain turns merely on the question as to which of us is the owner. But the thief and the robber place themselves outside the reach of the right of ownership, they deny in my ownership both the idea of it, and at the same time an essential condition of the existence of my person. No one ought to lend a hand for this end. In respect to a *bonâ fide* possessor of a thing which belongs to me I am in a totally different position. Here the question what I have to do, is no question of my consciousness of right, of my character, of my personality, but a pure question of interests; for the game involves no risk except the value of the thing, and it is perfectly justifiable if I set the gain and stake, and the possibility of a twofold loss, against one another, and thereafter form my decision to bring the action, to

(*a*) Page 21 of the 5th German edition; and page 18 of Mr. Ashworth's translation. The explanatory note which Ihering added to this paragraph in the 5th edition (and which he has retained in the 6th), should in justice to him be borne in mind here. But, at the same time, the language of the learned Professor in various parts of his exceedingly clever treatise are scarcely reconcileable with his explanation.—TRANS.

abstain from it, or to accept a compromise." So far, then, as those violations of right concern the criminal law, that is to say, the punishment and atonement for the wrong committed, it is in the modern States of the European Continent, and especially of Germany and Austria, to the people of which the Professor particularly addresses himself, the positive and, with very few exceptions, the exclusive duty of the executive power, and not of the injured persons, to prosecute the criminal act. In this criminal-law prosecution of the act lies the only guarantee for the security and maintenance of the peace of right. It is the penalty falling upon the evil-doer which essentially protects civil society against those arbitrary violations of right. The civil law point of view in all those violations of private right, such as theft, robbery, cheating, embezzlement, forgery, and the like, which constitute the bulk of our criminal processes, is thrown completely into the background; indeed, an attempted civil process would in most cases be absolutely useless, because its final purpose, the restoration of the violated right, or a compulsory compensation for the same, would from the nature of things be unattainable. And does the Professor really mean to assert, seriously, that even in those cases of arbitrary violations of right the injured person may forego that which is his *own* right, but not the *public* right, to impose a punishment, which indeed he is absolutely incompetent to abandon? that is to say, that he is obliged to take useless and vain trouble and to incur costs in order to prosecute the thief or the robber for the return of the stolen or robbed article, or for compensation for the injury? Is not the injured person in such cases met at the outset with the question, whether he will assert or abandon his right?

Does he not require at first to come to a resolution on that point? We spare ourselves the answer, which everyone will give for himself. More important and of greater significance is the following observation, which we would desire to attach to it. There is, in fact, a large host of cases of violations of right which not only inflict some injury or disadvantage on the person whose right is violated, but which are in themselves a source of common danger for the security and existence of the community at large, precisely because they involve a negation of the collective existing legal order of things, and because they embody an actual attack upon the entire condition of right of a people. But this is the reason why violations of right of the kind referred to are still punished with more or less severity, quite regardless of the claim of the injured person for the loss he has suffered, which it is frequently impossible to realise. It is these punishments also which alone deter persons from the commission of offences, for a civil law prosecution can at most compel the offender to disgorge that by which he has illegally enriched himself. The modern life of right has consequently separated the criminal prosecution from the civil claim; has made the former completely independent of the latter, and has transferred it to the organs of the executive power as a necessary duty to be discharged in the interests of the community. We ought not therefore, as the Professor appears to do, to confound for our modern relations the duty of a criminal-law prosecution with that of the prosecution of the civil claim of the injured person.

If, then, it were mere foolishness, which indeed ought not to be demanded of any reasonable man, in regard to the vast majority of acts punishable by the criminal

law, to prosecute the civil claim, owing to the general unfructuous character of such a proceeding, it would be no less so in regard to that far greater class of violations of right which has its origin in the inability of the person so offending to do justice to the right of the other; thus, for instance, in a multitude of debt relations, where the debtor has not the means to pay the debt, to keep his promise, or to fulfil the concluded contract. A reasonable creditor in such cases ought not to be required to prosecute his right by a civil action, if the state of the affairs of the debtor are sufficiently known to him, and when there is no question of establishing his claim for the future. In such cases, moreover, no doubt can arise, no great resolution is necessary, whether the entitled person should assert his right or abandon it. The assertion of the right would lead to no practical result.

This species of violations of right, which can only be termed arbitrary in a restricted sense, embraces another class of absolutely arbitrary violations of right, in regard to which the futility of asserting any civil claim is likewise manifest and apparent on the surface, and in regard to which therefore there is just as little need of a special resolution of the entitled person whether he will prosecute his clear and undoubted right or forego it, because the prosecution would be unfructuous and would entail upon him useless trouble, lengthy proceedings, and costs. We mean cases where the person bound by some obligation is perfectly well able to fulfil his engagement but will not do so, and the entitled person has no effectual means to compel performance. We are reminded, for example, of cases of breach of labour contracts, which have now become of such frequent occurrence.

A performance of work can only be directly compelled by physical force, perhaps by means of the bastinado or other corporal ill-treatment, which, in the end, however, would only lead to a very unsatisfactory performance of the work, and to a degree of exasperation from which the worst consequences might be anticipated. What employer of labour would at the present day, even if that means of compulsion were legally permitted, consent to adopt it? Who among them would not shrink from such an application of the club law, if it could be seriously employed towards the workmen. But indirect force, by the deprivation of freedom, has, as experience teaches, little success, and only operates by obliging the employer to maintain and feed the workman for the period during which his liberty is withdrawn from him at his own expense, without obtaining any corresponding consideration from the workman. Hence the present very vexed question, whether the arbitrary (perverse) breach of a labour-contract ought not to be criminally prosecuted and punished?—a question whose proper solution must depend on whether that form of violation of right has become so frequent as to cause a common danger for the maintenance of a well-ordered condition of right. What wretched worldly wisdom, then, in respect to such relations does the doctrine embody which the Professor teaches the employer of labour, and the observance of which he enjoins upon him as a moral duty: Assert your violated right by enforcing your claim by means of a civil process!

In like manner the fruitlessness of the assertion of a right comes very clearly into light in regard to a fourth class of arbitrary violations of right. In these also, there can be no hesitation as to whether the right is to

be asserted or abandoned, supposing always that we have to do with a reasonable man, who does not permit his passion or his consciousness of right (*rechtsgefühl*), as the Professor calls it, and which we shall consider more critically later on, to carry him to undue lengths for the sake of a violation of right which he has suffered. We refer to those numerous cases in which the entitled person is not able to prove a right which indeed belongs to him, but which is disputed. For in order to assert a right by means of an action its mere existence is not sufficient, but it is also necessary to adduce proof of it before the judge. He who is not in a position to adduce this proof and nevertheless brings his action, not only finally loses his right by the adverse sentence of the judge, but experiences into the bargain, in most cases, the bitter feeling of a wrong perpetrated against him by the judge, to whom he alone ascribes, blinded as he is by the passion of an outraged consciousness of right, the fault of a substantially unjust decision. And yet, despite all this, the Professor applauds him (the suitor). Go, then, and assert thy right and sue for it, thou who art bound to do so, as a duty to the commonwealth! Let us extract, from the many cases of the kind which the life of right offers to us, some striking and frequently occurring examples. A dishonour, an insult, is offered in the absence of witnesses, and in sight of only four eyes. The insulted person nevertheless seeks redress before the judge, and demands satisfaction. Does he not draw upon himself the inevitable dismissal of his action by the judge, if the insulter denies the insult, added to which the taunts and jeers of the insulter? does he not pay the costs? does he not lose time and neglect his work, and all this, as he

might have foreseen, uselessly? Or a pregnant woman sues for aliment for her child against him whom she knows with certainty to be the father, and is in a position to know, but she is unable to adduce proof of the fact of paternity (in Prussia, for instance, the compulsory tendering of an oath as a principal means of proof is not permitted). She is defeated in her action; she loses her right for ever, which perhaps later she might have been able to prove, and in addition is then laughed at by the absolved father of the child. Let the Professor imagine himself for once in the position of a guardian of a minor, whose business he has to superintend with the thoughtfulness of a prudent and reasonable father of a family. Will he be able to justify, uninfluenced by the passion of an outraged consciousness of right, the institution of a suit on behalf of his ward, the absolute fruitlessness of which he must foresee? And, if not, how can he advise others to do as a duty, what the duty of reasonable circumspection commands to neglect? Or does it make a distinction for the life of right, for the existence of legal order, whether my own right or that of my ward is violated? Does not the distinction rather lie exclusively in the greater or lesser degree of passion that I feel for the injury to my own personal right or for that sustained by my ward?

It needs, therefore, in respect to all the hitherto considered relations, as to which the processual assertion of the right is seen from the first to be fruitless, no special resolution on the part of a reasonable man whether he will assert his right or not. This resolution is rather necessarily prescribed and forced upon him by the condition of things. It is nevertheless much less

true that in all these cases right is sacrificed to peace. It is not for the sake of peace that one is withheld from the prosecution of right, but exclusively and only for the reason that this action would be entirely without result, and would not realise the intended aim—the restoration or maintenance of the right, or compensation or satisfaction for the same.

Let us turn now to another and very numerous class of violations of right, where conversely the assertion of right demands no sacrifice of peace; to those cases, in fact, in which the right of the entitled person is not in the least disputed or denied, on the contrary, is fully recognised, but the bound person for some reason or other does not perform his obligation, whether from negligence or because it is inconvenient for him to do so, or because necessity compels him to defer his performance to a better time. In these cases a light pressure on the part of the entitled person is all that is necessary, a judicial summons for payment, the mere institution of the action, in order to establish the right itself, and a contested suit properly so called, *i. e.*, a battle in the Professor's sense, never comes into question at all. But whoever is acquainted with legal practice knows that the violations of right of this kind constitute the vast majority of all violations of private right. We deduce the following proportional figures from the official statistics of Prussia for the year 1873, which includes the whole of the ancient provinces, with the exception of the Rhine province (*a*).

(*a*) Cf. *Justizminist Blatt* for 1874, p. 358. We have put on one side, as not applicable, the suits which were either abandoned or compromised.

A.—Petty Suits.

Disposed of by simple summons	572,571
By confession and contumacious decree .	45,672
Total	618,243
On the other hand—	
Decided by other forms of actual decree .	152,404

B.—More important Suits (*a*).

By simple mandate in the mandatory form of process	65,807
By confession and contumacious decree .	34,410
Respect	38,229
Total	138,446
On the other hand—	
By actual decree 7,518	
Respect 43,224	
Total . ———	50,742

These figures speak for themselves without any comment.

The remaining violations of right in the province of the private law, which form the subject not only of peculiar proceedings but of material judicial decision, which are, with few exceptions and irrespective of proceedings, founded on injuries, which although they partake of the form of civil suits do not secure any compensation to the injured person, but aim only at a criminal-law punishment of the injury by means of a public penalty, law-suits in which both parties believe themselves to be in the right; law-suits therefore for which the Professor no longer prescribes the battle and the assertion of right as a moral duty, but in reference to which he considers the person who is violated in his right to be quite justified "in setting

(*a*) *I.e.*, passed on default of appearance of the defendant.—Trans.

the probable gain and stake and the possibility of a twofold loss against one another, and thereafter forming his decision to bring the action, to abstain from it, or to accept a compromise." We do not know if, or to what extent, the Professor is experienced in the practice of the law, but we can at least assure him, from our own experience, that actions in which one party or the other is conscious of being in the wrong and disputes the right of his opponent out of mere arbitrariness, in order to avoid some legal obligation, belong as a whole to those which are rarely met with. Wicked debtors, for instance, do not resort as a rule to this expedient; they seek rather to attain their purpose by concealing their property, in order thus to deprive the entitled person, whose right they do not further dispute, of the means of satisfaction. But it is precisely those actions in which each party believes himself to be in the right that are almost always carried on with the greatest harshness, impatience, and animosity, and in which the action very soon assumes the nature or character of a tough ring fight for right.

Thus, then, the moral command of the Professor vanishes into nothing when confronted with reality. The phenomena which the actual life of right presents to us stand in direct conflict with that doctrine. There, where arbitrary violations of right take place, either no action at all or only one of a purely formal character is resorted to; where the violation of right is not intentional, it is then that mostly the worst and most rancorous actions arise. The exceptions to this rule only tend to confirm it.

Let us revert now once more to the second proposition of the Professor. He says: "Whatever the resolution

may be, it is in either case connected with a sacrifice; in the one case right is sacrificed to peace, in the other peace to right." What kind of peace, Mr. Professor? Internal or external peace? You can only mean the latter, since you had previously designated the assertion of right a battle; peace in reference to the opponent who has violate dmy right. But how does that peace then subsist if I abandon my violated right, or sacrifice it? Do I first destroy or break the existing peace when I assert and prosecute my right? In truth a singular view of life! Hitherto every one has believed that he destroys and breaks peace who violates the right of another, no matter how this other may conduct himself with reference to the violation of the right. But then you come forward and say, No, quite false; peace subsists, despite the violation of right, so long as the injured person does not take measures to assert his violated right. You certainly must say this, for, according to you, "it is no question of the battle of wrong against right, but of the battle of right against wrong." He therefore who is violated in his right is the aggressor, the wrong-doer the party aggressed. Thieves and robbers may truly very willingly approve of this morality, for according to it they are not peace-breakers, but the person whose property is stolen or who is robbed, and who prosecutes his right against them by means of an action, is the true and actual peace-breaker, and this breach of the peace is a moral duty! Or what otherwise does it mean,—that he sacrifices peace who asserts his right? Can one sacrifice something which is no longer there,—which does not exist? My neighbour knowingly depastures my land, or ploughs over my boundaries. I call him to account

for this act, but he disputes my right, and it does not suit me to take legal proceedings against him, either because the object is too trifling or the proof of my ownership too difficult. Nevertheless, is not the dispute there, the peace of right broken, the friendly neighbour-like relation destroyed? A friend insults me, and refuses afterwards to make amends. I may not, however, be inclined to take proceedings, and may therefore forego my right. Do peace and friendship now any longer exist between us? I have been persuaded by the honest face, and at the pressing request of another, to give him credit, but he betrays my trust and does not pay me at the stipulated time. I shun bringing an action. Does the old relation of trust continue to exist between me and my debtor, or rather have not mistrust and loss of respect taken the place of trust? A dispute as to a right may exist without the action having brought it to a decision; the action does not fan the flame; on the contrary, it is rather the means of ending an existing dispute. It continues for all time if no action is taken, unless a compromise or reconciliation follows, ready at any moment to blaze out afresh and to burst into flames. *But peace is sacrificed at the very moment when the dispute arises, and he sacrifices it who does not respect the right of the other party, or who violates it.*

It is certainly quite otherwise with respect to internal peace in regard to the assertion and prosecution of a violated right by means of an action. This internal peace, or peace of the mind, the Professor, according to his usual habit, inextricably confuses again with external peace, or the peace of right, which he could only have in his mind when he speaks of a sacrifice of peace by engaging in a battle for right with the opposite

party: for that sacrifice of peace becomes for him a sacrifice of internal peace when he says, immediately afterwards (*a*): "Daily experience shows us actions in which the value of the object in dispute stands out of all proportion to the probable expenditure of trouble, *excitement*, and costs." And, in fact, it is this internal peace, the peace of the mind, which is too frequently sacrificed by the strain of the action, and in its place now appear continuous excitement, bitter disappointment, and tormenting cares, which rob sleep, gradually undermine the health, and take away all desire for work and regular activity. But the more certain and clear it is, that by the assertion of a right a destruction of the peace of mind will be caused, the less there can be any question of a moral *duty* to assert the same, lest all the blessings which that peace brings with it might perish, while the disadvantages just mentioned would accrue.

The bitter feeling of an outraged and mortified consciousness of right often enough, unhappily, vents itself in an action, even when the latter appears doubtful and without any prospect of success, and the chosen counsel has himself advised against its institution. To proceed nevertheless in such cases to an action must surely be regarded rather as foolishness and want of judgment than as the discharge of a moral duty. For it is not passion but conscience that prescribes our duty for us, and woe to him who permits the former to dictate it to him. But woe to him threefold who elevates passion to the throne in the place of conscience, and in that of a reasonable, calm, and sober examination, deliberation, and reflection, and makes it the judge of our duties.

(*a*) Page 16 of 5th German edition; and page 14 of Mr. Ashworth's translation.

However true then it may be that the assertion of a violated right by way of legal process is not a pure question of interests, but is frequently also a question of character, it is nevertheless not everything that an excited and passionate character finds agreeable that is for that reason good or correct or proper. And, as with private individuals, so also is it precisely the same with nations, for it is by no means always the wisest and best course that a passionate, hot-headed, and excitable people permits itself to resolve upon or to engage in. Or, Mr. Professor, if the partition of Poland was a wrong arbitrarily committed by the Powers that took part in the partition, is not then, according to your theory, every struggle by which the subject Poles may from time to time seek to re-establish their old kingdom and to enforce their independence, not only a permissible but an absolutely justifiable act, nay, even a moral duty on their part? What do you answer?

At the same time one ought not to compare the position of nations with that of private persons, for the destinies of the former determine themselves generally in history not according to what is their due but according to the power indwelling in them, and this also in their disputes, whilst the disputes of private persons, when made the subject of a lawsuit, are decided in accordance with right. When a war takes place between nations, the origin of it may be due to a question of right, or that ground may be made the pretext for it; but in the war itself it is might and not right that gives the victory. A legal action and war are two means of putting an end to a dispute that have nothing in common with each other. If nations having a dispute do not wish to measure their power against one another,

they will always be disposed to settle their quarrel by a peaceful compromise or understanding, or upon the basis of arbitration, rather than by means of war. In the converse case, however, some violated right or other is never wanting as a pretext for war. It only needs, for example, to misrepresent to an ignorant people that it has been shamefully insulted by a foreign ruler, in the person of its representative, to make it vehemently demand war. Every nation feels the same natural instinct to develope its power, to extend and spread it, so far as it may, and, in carrying out this instinct, it inquires very little after its rights. It stops at the point where it finds resistance that cannot be overcome. So the old Asiatic Empires. So Rome. So, in modern times, Russia and England in Asia. So North America. There the question of right vanishes completely in the presence of might. Still, because this is so, one ought not to lay it down as an axiom, that what is fit for a nation to do, when it has a dispute with another, is fit also for a private person: the position of the two is completely different. The relation of nations and states to one another rests finally on their relative power, and consequently an arbitrary wrong endured by one at the hands of another is always a sign of weakness, a threatened danger for its future existence. The dealings of private persons with each other are not, however, regulated by their respective powers, but by their mutual rights, and even their legal proceedings are not decided in accordance with might, but with their rights. Thus, the relinquishment of a disputed right, in order to avoid an action, betokens no weakness on the part of the person violated in his right, nor does it involve a danger for the future existence of the person who sacrifices his

right, for all his other rights continue to exist, and just the same remedy remains open to him of asserting them in an action.

But the daily life, and the daily commerce of right of men amongst each other is good homely prose, and every element of poetry is then out of place. The sound, clear human understanding is the prevailing element in it, imagination and passion the evil. For this reason the yielding up to passion of the outraged consciousness of right, the battle for right down to the knife, may indeed demonstrate the poetry of character, but it is not suitable for practical life, and a moral duty it can never be, seeing that it disregards every reasonable safeguard of deliberation and reflection. It is not allowable to confound poetry and reality with one another, and to transport our æsthetical sensation from the work of art to reality. When we are pleased with the poetical display of a passionately-aroused character, for example, like that of Lady Macbeth, or of Othello, we do not mean to call the passion itself good, which leads in the former case to the murder of King Duncan, in the latter to that of Desdemona. On the contrary, we demand that the poet shall conceive that passion as a moral delinquency of the persons represented and suffer it to be recognised as such in the final catastrophe. When we derive æsthetical pleasure from the poetical or pictorial description of a battle, it is the art of the description which gives us pleasure, not the battle as such, which, if it appeared in reality before our eyes, would fill us with the utmost horror. Or what cultivated man would feel joy or pleasure by seeing a Laocoon encircled with serpents; a war raging with all its terrible horrors in his immediate

neighbourhood, and thousands perishing in the bloody carnage of battle! But then the Professor is of a different stamp than the rest of mankind. He confesses himself expressly guilty of pleasure in such a glorious battle (*a*). But, for the sake of his honour, we feel ourselves compelled to assume, that he again confounds here, with his accustomed logic, pleasure in the description of a battle with pleasure in the battle itself. Were it otherwise, we would most heartily deplore in his interests, that it is no longer possible at the present day to offer him the spectacle of a gladiatorial show. But he might still perhaps in Spain feed his eyes on bloody bull-fights, and, most agreeable of all, would it be for him to dwell on the confines and in the backwoods of America, where he could best accommodate himself to his high moral task of daily winning his freedom and life, and provide unlimited enjoyment to his taste for battle. We certainly understand the task of civilized and cultivated nations to be something different, and it would in truth be bad for the progress of culture in a nation, if in point of fact every individual in it were to be daily engaged in fighting for life and liberty afresh.

The assertion of an injured consciousness of right must have, so the Professor further contends (*b*), an ideal purpose; it is a question therein of the personality, of the self-esteem of the person injured in his right. Let us look at it nearer. Let us leave the phrase, and look at the reality of life. The injured person gains a

(*a*) Page 94 of the 5th German edition; and page 83 of Mr. Ashworth's translation.

(*b*) Page 18 of 5th German edition; and page 16 of Mr. Ashworth's translation.

victorious judgment against a thief or robber, or a wicked debtor. What has right generally, what especially the consciousness of right of the injured person, what his self-esteem gained, if the opponent nevertheless succeeds in depriving him of every object of satisfaction? Do not the action and judgment appear as the mere irony of right, which cannot, despite all, be realised? But again, and more particularly in those legal disputes in which both parties have a *bonâ fide* belief in their good right—and these constitute, indeed, the greatest number of actual and real actions—each party imagines, as a rule, as the Professor says, and we agree with him, that the other party is knowingly doing him a wrong, and it is only this subjective consciousness of right, and not the objective right by itself, that must determine the resolution and duty either to assert the right or to sacrifice it. But then it is of course obvious that by the judicial judgment only one party can obtain the victory—the other must succumb. What, we ask—and we demand a distinct answer—what does the defeated party then gain in self-esteem by the assertion of his injured consciousness of right, or what gain accrues to his personality? Does not the precise opposite of that happen which the Professor intends to attain by his command of accepting the battle, namely, *a mortification of the consciousness of right increased by a no longer-to-be-contested judicial decree, a weakening of the same, instead of the anticipated strengthening, and, as a final consequence, resulting from repeated cases of the kind, a complete disregard of the whole legal order of things?* This is the reverse side of the picture which you, Mr. Professor, discard, and we venture, therefore, to make the contrary assertion—that in all cases where each party

believes himself to be in the right, however much the subjective consciousness of right of both may attribute an intentional wrong to the other party, the action is always attended with evil, wholly irrespective of the unproductive expenditure of time and money which it involves, and the moral harm that is produced by it is very much greater than that possibly effected by the relinquishment of the right, or than the moral advantage which accompanies the successful assertion of the right.

This view of ours, of the harmfulness of legal proceedings, is also no new one. We meet with it as early as the general Prussian *Gerichtsordnung* of the year 1793, in the Introduction of which (§ 22) it is said: "Even in the most judicious use of legal proceedings they still always remain, *by reason of the injurious influence* that they are capable of exercising, *not only on the circumstances but also upon the moral character of the parties*, an evil for civil society which is to be avoided to the utmost extent." We openly avow that we place more reliance on the judgment and experience of the author of that Ordinance than on the authority of the Professor and his fine-sounding phrases.

The consciousness of right! Again and again, Mr. Professor, you return to this consciousness of right, and attach the most significant weight to it. Well, then, if in anything, we are agreed in this, that the continuous lifting, strengthening, and invigorating of the consciousness of right is one of the principal tasks of every civil society, and of every State. The assured existence of legal order is the first and necessary supposition for the prosperity of a nation. But let us also understand each other rightly. You under-

stand, when you speak of the consciousness of right, the consciousness of one's own right; we understand by it the sentiment of respect for the right of others. The former, permit us to say, has its nature so deeply implanted in the human breast that it is not necessary to take any special care about strengthening it. It is already living in the child as soon as it begins to distinguish right from wrong; it is active and busy, often, unhappily, only too much so, amongst every people, even amongst the rudest and most uncultivated, and it is frequently much more necessary to soften that feeling, to guide it to a moderate calmness of reasonable reflection and examination, than to incite or spur it; and for that purpose the strictly-regulated form of civil procedure, in which the determination of the suit is submitted to the judge, serves as a very excellent means. Such a determination takes the place of an arbitrary struggle dictated by passion, of the club-law and combat, of the lynch-law and duel, of blood-revenge—in short, of self-redress. You also call the feeling produced by a violation of right a feeling of pain. But wherever a pain is felt there Nature always strives herself to provide a means of alleviating or removing it. You prefer again, indeed, to confuse the matter, and to say (*a*): "The feeling of pain *reminds one of the duty* of self-preservation;" we think, on the other hand, that the feeling of pain *drives* men to seek the means of self-preservation; he obeys an instinct, that of self-preservation, as you also, indeed, at first denominated it, *not a duty, for which he had little concern in the feeling of pain.* You lay down the proposition, that "resist-

(*a*) Page 27 of the 5th German edition; and page 24 of Mr. Ashworth's translation.

ance against wrong is a duty—a duty that the entitled person owes to himself, for it is a command of moral self-preservation" (*a*). We assert, the resistance of man against a wrong perpetrated against him is his natural instinct, which he will follow if no other special circumstances intervene to make him act otherwise. And, since that instinct is a universal and very powerful one, it needs no extraneous influence to commend it to him, nor the composition of long epistles upon the text of paying a ready obedience to it. Convinced as we are for this reason that, as soon as the assertion of a right has any well-grounded prospect of success, and the sacrifices required are not disproportioned to the asserted right, the entitled person himself, without any consciousness of a duty, will usually prosecute it, we may calmly leave and permit him to do what, in each individual case, he deems fit and proper, since his own interests will best and most safely guide him. It is, however, a wholly different thing to leave this question for the decision of the entitled person, and to preach a cowardly submission to wrong, as you, Mr. Professor, love to denominate that first alternative.

It is essentially otherwise in regard to the consciousness of right, which reveals itself in respect for the rights of others. This quality is less developed the ruder and more uncivilized a nation is, or the lower the degree of culture upon which it stands. Such a consciousness will be gradually inculcated by education, morality, religion, and the good example of the governing classes, and we shall not be wholly wrong in the statement, that the intensity of the feeling for our own

(*a*) Page 19 of the 5th German edition; and page 17 of Mr. Ashworth's translation.

right will stand in an inverse ratio to the strength of the sentiment of respect for the rights of others. If the club-law of the Middle Ages and the disgraceful institution of blood-revenge amongst the Corsicans, offer eloquent examples of the truth of this statement, so also we shall find within every civilized nation, that the more the respect for right and law prevails amongst the better classes, the more the intensity of the feeling of suffered wrong will be lessened. On the other hand, where the lower classes, particularly the working class, from which, in fact, the criminal world is recruited, are constantly ready to defend their right by means of self-redress or by a thrust of the knife, the less is their respect, as a body, for the rights of others. Anyone can daily obtain experience of this in the domestic and menial relations, in the relation between employers and labourers generally; in the country as well as in cities, without distinction of any special kind of vocation. But if this be so, then we do not know what is to be gained by the strengthening of the feeling for one's own right.

He is said to lose his self-esteem, to depreciate the value of his personality, who does not assert his right, or his consciousness of right, and relinquishes the most insignificant right of property, when it is violated, however inconvenient it may be to have a dispute about it; who, for instance—to cite your own examples, Mr. Professor—pays an extortionate hotel-keeper his account, or gives a cabman more than his proper fare. Has the like ever been heard, shrieked into the world with the noise of a trombone, or written? Nor is this the crowning-point of the sentence which is delivered with great pathos, for does it not yet remain to unfold the

picture of the pig-headed traveller from Old England, who, in order to assert his right against the hotel-keepers and cabmen, "defers, if needs be, his departure, and remains for days at the place, and spends ten times the sum which he refuses to pay. The people laugh at him and do not understand him" (*a*). Oh, Mr. Professor, the world understands him very well. It says, with good reason, the Englishman has the spleen. Or, Mr. Professor, would you really, when you undertake a pleasure tour, and in a foreign town, a cabman who drives you to the railway station demands from you a half or a whole mark beyond his fare, lose your train in consequence of the dispute, and sacrifice your time for travel, simply to assert your right, or would you neglect for the same reason an even more important transaction, which calls you, or pressing duties connected with your family or business which demand your presence? And, if not, where do you fix the limits? Is there, and can there be, any other factor of decision than that of measuring the interests of the entitled person, than that of estimating the advantages and disadvantages of each kind on both sides, for which purpose the strictly just are not exclusively to be reckoned?

Assuredly, amongst a hundred Germans or Austrians, you will find not merely hardly ten, but not one, who would act in accordance with your rule, or according to the example of the Englishman. They are, thank God, too sensible for that, and time and money are far too precious and valuable to them, to allow of their indulging themselves in such whims. But for ourselves we

(*a*) Page 44 of 5th German edition; and page 39 of Mr. Ashworth's translation.

also believe that even amongst a hundred English tourists scarcely one will be found to correspond to your description, Mr. Professor, although Englishmen who travel on the Continent do not usually want either money or time. According to our own, not altogether small, experience, it is precisely these English gentlemen, who, in their many travels all over the Continent, pay for the same services, in hotels and elsewhere, very much higher than persons belonging to other nationalities; and, on the other hand, many instances are known to us of German travellers who have resisted very earnestly extortionate demands, although they would not venture on that account to neglect other and more important interests. But in almost all cases that have come within our knowledge—and they are many—in which they have, in fact, caused legal proceedings to be taken on this account, they have usually come off losers for one reason or another. Have they then gained much by their consciousness of right, their self-esteem, and the value of their personality, when their opponent has laughed at them into the bargain?

Now there is nothing more certain than that the re-action of the consciousness of right of States (we prefer to say Nations, for is it not true, Mr. Professor, that States have no consciences?) and of individuals is most intense where they have felt themselves threatened in their peculiar conditions of life; indeed it would be in the highest degree extraordinary if such were not the case. But it surely follows from this, according to the received logic of a healthy human understanding, that the re-action of the consciousness of right in regard to other violations of right is much less; that in fact, in regard to such violations of right that are very un-

important for the entitled person, and his peculiar conditions of life, as, for example, petty overcharges of hotel-keepers and hackney-coachmen, it will be quite insignificant and weak. This also appears to have been first perceived by the Professor, when, in reference to the examples of officers, peasants and merchants, he draws the conclusion, that "the consciousness of right exhibits a very different degree of sensibility according to the differences of social rank and profession, since it measures the irritable character of a violation of right according to the standard of class interests" (*a*); and when he continues: "the circumstance that the greatest sensibility of the consciousness of right in the three named classes exhibits itself precisely in those points in which we have discovered the peculiar conditions of life of these classes to lie, shows that the re-action of the consciousness of right does not regulate itself, like an ordinary passion, entirely according to the individual elements of temperament and character, but that there co-operates with it an ethical element (why, ethical, Mr. Professor? it is the purest Egoism, the instinct of self-preservation, which is called into question, and since when has this instinct become something ethical, seeing that brute beasts, as well as men, possess it?): the feeling of the distinct indispensability of this institution of right for the special purpose of life of this particular class or individual" (*a*). Anyone might believe from this that the Professor would draw the necessary conclusion, that every class and individual possesses, or at least may possess, other rights which do not affect its or his peculiar conditions of life, or parti-

(*a*) Page 30 of the 5th German edition; and page 27 of Mr. Ashworth's translation.

cular purpose of life, and whose violation would less sensibly concern it or him, or produce less pain, than it would in the case of another class or individual. But he would be much mistaken. With that logic which is now familiar to us, the Professor intends rather to "place in its needful light the truth, that every entitled person defends in his right the ethical conditions of his life" (*a*). Therefore, rightly understood, no more in individual or in certain definite and distinct rights appertaining to him, but in all his rights, no matter how important or unimportant, or how significant or insignificant they may be to him.

Thus, right generally assumes at once the same importance for every one, which immediately before was only recognized in the case of certain special rights. And although, no doubt, right in its general sense, that is, the totality of all rights belonging to an individual, embraces those that are of an important character to him, yet it is never this totality of rights, or right in its general sense, that is violated, but only in all cases a particular distinct right; to vindicate, to assert, is always merely an individual right of this kind.

"The degree of energy," the Professor declares, "which the consciousness of right displays towards a (any ?) violation of right is in my eyes a certain standard of the degree of robustness of the sentiment which the individual class or nation entertains for the importance of right generally, as well as of particular institutions, both as such and with reference to their own special purposes of life" (*a*). We have, on the other hand,

(*a*) Page 30 of the 5th German edition; and page 27 of Mr. Ashworth's translation.

already argued above and endeavoured to prove, that the degree of energy which the consciousness of right displays against a violation of right, stands in the converse relation to the degree of robustness of the sentiment which the individual class or nation entertains for the true importance of right, in so far, for example, as this sentiment asserts itself in a respect for the rights of others; and that amongst rude and uncivilized nations, as well as amongst the lower classes, that re-action is more uncontrollable than amongst civilized nations and the higher classes; although it will scarcely be asserted that the latter feel the importance of right in a lesser degree, or that they have less respect for the rights of others than the former.

A living, healthy consciousness of right! Would that the Professor had some notion of what this really means, that he could comprehend that a living consciousness of right only in so far possesses a moral value, or its great importance for the existence of civil society, as it signifies the feeling of respect for the rights of others. But a strong self-consciousness of personal right, whose moral value the Professor emphasises, and which he proclaims as the ruling duty of mankind, is nothing else than a natural instinct, whose satisfaction man demands, an instinct which in and by itself is without as little trace of an ethical element as the instinct after food and drink. It is the personal dear Self, it is the most pronounced Egoism, which the Professor enthrones as the ideal of man, when he writes (*a*) :—"The in-

(*a*) Page 41 of the 5th German edition; and page 37 of Mr. Ashworth's translation. The word "gewalt" being substituted in the later editions for the words "heftigkeit" and "nochhaltigkeit" as translated in the text.

tensity or resoluteness with which the consciousness of right resents a wrong experienced by it is the test of its soundness." All our previous doctrines of morality and duty are here completely knocked on the head. But this ought not to surprise us in a doctrine which proclaims battle from the first as a moral principle, and knows of no other means for securing peace except battle (*a*), a peace which surely could never be realized in fact, because it requires for its maintenance an ever-recurring battle. No: battle, as such, is no moral duty; and if it is not disputable that the battle for existence is a necessary natural law, it appears also to be the task of morality to overcome that battle which the instinct of Egoism calls forth, and to substitute it more and more by peace effected by the reconciliation of opposing interests,—a task to the accomplishment of which every existing regulation of right pre-eminently contributes. The essence therefore of a genuine consciousness of right is not *action* (THAT) (*a*); but, on the contrary, *renunciation* (ENTSAGUNG), that is to say, resistance to selfish desires and covetousness after the possessions of others, the subduing of inimical designs against third persons, the offering of sacrifices to satisfy a given promise, and all this in the common interests of the peace of right on the side of the totality of Civil Society. And for this reason not "susceptibility, *i. e.*, capacity to feel the pain of an infringement of right, and energy, *i. e.*, the courage and determination to repel the attack" (*b*), are the criteria of a healthy consciousness of right (*b*), but the constant never-wavering recognition of even the smallest

(*a*) Page 1.

(*b*) Page 42 of 5th German edition; and page 37 of Mr. Ashworth's translation.

and most insignificant right of another, and a holy immutable horror of its violation.

But it would be almost impossible to follow the Professor everywhere through the labyrinth of his inconsistencies, the labour would be far too great. Thus, while he first tells us in the clearest possible manner that man defends in his right his ethical conditions of life, and this or that class in certain individual rights the conditions of life peculiar to it, and that therefore the violation of a right, and particularly of such a special right, threatens his whole existence, nay that the instinct to assert his right is nothing but the instinct of moral self-preservation, he then suddenly declares in the sharpest contrast thereto, "that he cannot for his part subscribe to such a conception, which sees in an action for *meum* and *teum* a pure question of interest" (*a*); "that rather every right, of whatever kind it may be, by its connection with the entitled person, has, in contrast to that purely substantial value which it possesses from the standpoint of interest, an incommensurable value, which I distinguish as the *ideal* value" (*b*). But is not the interest to defend my person and my whole existence very much greater and more powerful than to preserve only particular things and objects of value that are destined to serve the former? Is it not playing fast and loose in the most flagrant manner with words and language to distinguish the assertion and defence of a thing belonging to me as my *interest;* but when also my person, my whole existence, comes into question to say,

(*a*) Page 34 of the 5th German edition; and page 30 of Mr. Ashworth's translation.

(*b*) Page 39 of the 5th German edition; and page 35 of Mr. Ashworth's translation.

the act is then no longer one arising out of *interest*, but an act directed to an *ideal purpose?* Is it then no *interest* which impels, incites, and leads me to provide for my self-preservation, or to defend my life, my physical or moral existence, when they are threatened? How ingenious!

And then the example by which the Professor illustrates his assertion: the peasant who defends his own, not because it is an object of value, but because it is his own (*a*). Therefore, not because it serves him as a means of supporting life, of acquisition, of enjoyment, but only for the sake of the thing itself and of his ownership therein, does the peasant defend the latter. Let who can understand that! "What has the thing which belongs to me," the Professor asks his opponent, "to do with my person?" and he makes him answer: "It serves me as a means of supporting life, of acquisition and enjoyment," in the sense as if it had nothing to do in such matters with the person. Now, we certainly think that everything which is useful to us has just for that very reason a great deal to do with our person; *indeed, that we can, generally speaking, imagine no other lawful relation between a person and a thing, than that the latter serves the former, and is destined to do so.* But the Professor teaches us otherwise, for he understands by a "lawful sense of ownership" not the "instinct of acquisition," but, on the contrary, declares "labour to be the historical source and the ethical ground of justification of ownership" (*a*). Labour and the instinct of acquisition are therefore, according to him, two absolutely different things, that have nothing in common

(*a*) Page 33 of the 5th German edition; and page 30 of Mr. Ashworth's translation.

with one another, although we are ordinarily accustomed to regard labour as the mere product of the instinct of acquisition, and that man only labours, like the peasant, "that most worthy representative of ownership," in order to acquire. But now, you peasants, let it be confessed, that we know better. You cultivate your fields, not for the sake of acquisition, not in order to draw from thence your means of supporting life, or of your enjoyment, but for the sake of labour. You defend your field, not because its produce may be serviceable and useful to you, but because it is a moral duty for you to do so, because the field is your *own*, for the love of the field and the farm.

Mr. Professor, be candid! The whole of your fine writing is not seriously meant. You are merely playing a bad joke upon us!

Indeed, no! You speak unfortunately in bitter earnest. You compare—so weighty do you consider the duty of the person violated in his right to assert the same, you compare him, who sacrifices his right out of a "cowardly policy," "who turns away from the battle for right for the sake of convenience, so long as the value of the object does not induce him to act otherwise," with "the coward who flies from the battle-field, and saves, what others sacrifice, his life" (*a*). But, according to your previous argument, it was exactly he who asserts and defends his right, and accordingly stands up for his moral self-preservation, who was placed on the same footing with him who provides for his physical self-preservation; indeed, it was this similarity of both that formed the starting part and founda-

(*a*) Page 36 of the 5th German edition; and page 32 of Mr. Ashworth's translation.

tion of your whole argument. What else, then, does the coward do who flies from the battle-field and saves his life than provide for his physical self-preservation? You see the complete contradiction into which you have landed yourself, and "a complete contradiction is alike mystifying for wise men as for fools." Into such a contradiction must one, however, fall if one perverts, like you, Mr. Professor, the nature of things, and invents a moral duty out of the instinct of self-preservation. Whither this leads you can best judge by your own example of the runaway soldier—for you will scarcely concede or wish to assert, that the soldier who flies from the battle-field, and who follows, therefore, the instinct of self-preservation, "the highest law of the whole animal world," fulfils a *moral duty*. And thus will he also, in truth, who in the eternal and ceaseless battle for existence asserts his right, and thereby defends his moral existence, obey only a command of nature, but not discharge a moral duty.

Nevertheless, after you have laboured in this way through some fifty pages to prove to us that the asser- of a violated right is a moral duty, therefore a moral command for everyone, you quite suddenly (*a*) throw off the mask and declare the precept *suffer no wrong* to be of *much greater* practical importance than a mere moral command, and assign to the latter an efficacity which "in principle" is of far less force. Your words are: "If I had to arrange the two propositions, *do no wrong* and *suffer no wrong*, in order, according to their practical importance, I would say, the first rule is, *suffer no wrong*, the second, *do no wrong*. For, taking man as he is, the

(*a*) Page 49 of the 5th German edition; and page 44 of Mr. Ashworth's translation.

certainty of his meeting with a firm, resolute resistance on the part of the entitled person, will do more to restrain him from the commission of wrong, than a command, which, if we conceive it apart from that impediment, possesses in principle only the force of a mere moral command." The rule, therefore, SUFFER NO WRONG is no mere moral command; and if that is so, then why have you, Mr. Professor, given yourself the trouble to prove in the fifty preceding pages, that the rule SUFFER NO WRONG is a moral duty, and therefore surely a moral command? Have you not thus pronounced your own judgment upon your work, that all your trouble and labour have been useless and unnecessary? And if, moreover, the rule SUFFER NO WRONG is no mere moral command, if you finally acknowledged this, why did you not ask yourself the further natural question, What else then is it? Surely the answer lay close at hand! namely, what we have already stated above, a *command of nature*, and as such, in fact, of very much stronger practical effect than a mere moral command, and therein we are agreed with you. Is it then true what is so often asserted, that many German *savants*, owing to their vast erudition, are not able to see the wood for the trees?

A natural command, however, prevails of itself in every human being. It requires no teacher and no implanting in the child's mind. But it is otherwise with the commands of morality, which only the morally-trained and educated man, and not the wild savage, growing up without any education, obeys. For this reason we wish to be left in undisturbed possession of the good old custom, of seeking to impress upon our children, from their earliest infancy upwards, the pre-

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are the observations that are tacked on to these propositions by the Professor, and the deductions that he would draw from them? Let us hear. "Whilst the realisation of the public and criminal law is secured by the fact that it is imposed on the organs of the executive power as a duty, that of the private law is brought in the form (?) of a right of a private person, that is to say, it is left entirely to his independent initiative and self-activity. In the former case it depends upon whether the authorities and officials of the State fulfil their duty; in the latter, upon whether the private persons will assert their right. If the latter neglect this in any given relation continuously and generally, whether from ignorance of their right or from considerations of comfort or fear, then the rule of law is paralysed" (*a*); and "the question of the existence of all the principles of public law depends upon the faithfulness of the officials to their duty; that of the principles of the private law upon the efficacy of those motives which induce the entitled person to assert his right, his interest, and his consciousness of right. If these fail in their duty,—if the consciousness of right is dull and languid, and the interest not powerful enough to conquer the love of comfort and the dislike of quarrelling and disputing, or the aversion of resorting to an action,—the simple result is that the rule of law is not applied" (*a*). In what mode, alone, then does the Professor imagine the realisation of a private right to consist? Wherein does the vindication or realisation of a private right alone display itself according to him? Exclusively in and by the institution of an action, as

(*a*) Page 46 of the 5th German edition; and page 41 of Mr. Ashworth's translation.

often as the right is violated or disputed! Without a previous violation of right an assertion or vindication of the same is inconceivable to the Professor.

We have already pointed out, when entering on our refutation of the Professor's detailed arguments, that it is precisely on this point that the Professor has committed a very essential error, which has served in no small degree to form the basis of his conception of the importance of the battle for right. It is not in the relatively small number of cases of violated or only disputed right that opportunity is given to the private law to vindicate itself, but quite as legitimately and more especially in the *numberless* jural relations of all kinds, which are wholly and completely recognised by all parties concerned therein, and in which the entitled person exercises his right, without engaging in any dispute or act of resistance, and without any molestation or encroachment of his right on the part of a third person. We will not repeat here what we have already said, and will therefore only refer back to it. But it is just in this respect that the essential distinction lies between the criminal and private law—that the former is only realised, manifested, and vindicated, when the evil-doer is brought to trial, when legal proceedings are taken against him, and when the punishment attached to his offence is executed upon him; that, therefore, the exercise of the penal-law power is a duty of the State in every case which happens; while the non-exercise of it, according to the pleasure of individuals, is mere arbitrariness and a threat of the security of right of the civil community. Not so in the private law. Here the entitled person is absolute master of his right, and must be so, for how else could there be any question of

a right? And just as he may relinquish his right at any moment, not only without any danger to the maintenance of legal order but under its protection and sanction, or cast it aside, or forego it, even when it is undisputed and unviolated, so it is not evident why he should not all the more be able to do this, without incurring any such danger to the maintenance of legal order, in the case when his own right, which has no other purpose than to secure a means for the satisfaction of his needs, wishes, and inclinations, becomes to him a source of trouble and a burden, by driving him to a resistance in its exercise, which he can only hope to subdue or to remove by more trouble and sacrifices of all kinds than the right is worth to him. The individual would indeed be no longer master over his right, which only exists for his benefit (absolutely for no other purpose, Mr. Professor), if the assertion of the same in every case, even where it can no longer prove of service to him, were a duty imposed upon every one. But precisely because from the nature of things the entitled person is master over his right and must be so, and because, therefore, the exercise of it depends simply and solely upon his own will, *it is not true that whenever a private right is not exercised, or is not vindicated, no matter what the ground may be, the abstract rule of right, which shows itself in the concrete right, becomes in consequence paralysed.* The rule of law continues to exist for all the remaining jural relations of the like kind in full force and vigour, and if it is perfectly correct to say that "the entitled person by asserting his right, maintains it within the narrow scope which it assumes" (*a*), it by no means

(*a*) Page 48 of the 5th German edition; and page 42 of Mr. Ashworth's translation.

follows as a necessary corollary, as the Professor concludes, that law perishes when the entitled person does not always assert his right. It continues to exist, although an individual neglects his right. No doubt the Professor assumes under the proposition that such a neglect may at some stage become general and permanent in regard to a particular relation; but this is only possible and conceivable when all entitled persons in the same position no longer attach any weight to their right, or have no longer any interest in its maintenance. Then, certainly, the rule of law would be paralysed; but upon the most substantial ground that it is then no longer in harmony with the present altered relations of commerce; in short, because it no longer possesses any vitality, for DESUETUDE is a ground of abolition of rules of law recognised in the law itself. But immediately as even a single individual amongst the entitled persons vindicates his right, whether by means of an action, if it happens to be disputed, or by virtue of exercising it without any such recourse to legal proceedings when it is recognised, *the rule of law exists in full force and validity*, and the conduct of all the rest does not prejudice its continuing and legal force, or its efficacy. The supposition, finally, that notwithstanding a still watchful interest for the maintenance of certain existing jural relations, the entitled persons as a body may neglect, for the love of comfort or pleasure, to fight for their possibly disputed right, or to defend it, in case only there is no prospect of success for them, is a supposition which human nature absolutely contradicts, and which is never realised in practice. It is a mere phantom of the imagination of the Professor, who it is who has asserted that man defends in his right his own existence. And would *all* entitled persons, then—not

merely an individual or two here or there, and not simply in particular cases of trifling interests or desires—sacrifice so easily this existence of theirs, for the love of comfort and pleasure, or from aversion to a quarrel or dispute? By no means, Mr. Professor. And yet, once more, you adduce here the illustration of a soldier flying from the battle-field and abandoning his right, and once more must we reject the illustration as wholly inapplicable. For the soldier who flies from the battle wishes to save his life, when the sacrifice of it is demanded in the general interest. But, according to you, Mr. Professor, he who, on the other hand, shrinks from an action out of aversion for a quarrel, sacrifices with his right his moral existence, and in the general interest you require from him not the sacrifice of his existence, but, conversely, its assertion and defence. Whilst, therefore, in battle the instinct of self-preservation frequently enough causes a general abandonment of colours, when victory seems to smile on the enemy, to such an extent that no one, or only the few, will maintain his or their position, that self-same instinct will conversely, when it is a question of the assertion of some important right, incite most persons to the battle for right, as soon as the latter becomes necessary. Thus, the danger which you, Mr. Professor, paint for us, and which is said to grow out of a general surrender of the battle for right, is only an imaginary one; that which you hold up to our gaze as a terrible vision, is, after all, a mere scarecrow, without life or reality. Every commonwealth may, therefore, leave it with the fullest confidence to the individual himself, whether and how far he will assert a private right belonging to him in an impending dispute, certain that his own interest will so

guide him that the general interest will also be sufficiently secured thereby, and the individual does not need to be urged to assert his right constantly and everywhere, because he thereby fulfils a duty towards the commonwealth. The interest of the individual and the interests of the totality always coincide here, taken as a whole, in all essential respects. It is this fact, Mr. Professor, which you have completely misunderstood in your work, and hence the needless alarm-cry for battle, which, even without it, burns and rages quite enough.

Certainly, not only in ancient Rome but in a much greater measure in ancient Germany, the private law and criminal law were not separated from each other in the way they are in a modern civilised State. The exercise of rights appertaining to both these departments of law depended for the most part, if not wholly and absolutely, upon the arbitrary will of the injured person. But because the disadvantages and dangers to the commonwealth which underlaid such a system were well known, civilization was driven more and more, in her onward progress, to separate and make independent of each other, the executive administration of the two departments of the criminal and private law, making the application of the penal power a duty of the State, or of its organs, but leaving the assertion of a private right, as formerly, to the discretion and arbitrary judgment of the entitled person, whose own interest will always be the surest guide for him. But it is quite inadmissible, on the strength of this fact, to wish to prove something at the present day, under completely altered conditions, by adducing examples from a remote past, which would be to deny altogether the considerable progress in the development of law pre-

cisely in this particular. In short, it is not the conditions of right of ancient Rome, but of those of our own present age, that regulate the duties which are obligatory upon us.

"If arbitrariness and lawlessness insolently and audaciously dare to lift their head," says the Professor (*a*), "this is always a sure sign that those who were called upon to defend the law have not performed their duty." It may be so as regards the criminal law, whose task it is to combat and overcome wrong and lawlessness. But does the Professor really imagine that if a person whose property is stolen, or who has been defrauded, or a creditor, or an employer of labour, asserts and prosecutes his civil claim against the thief, or the man who has swindled him, or the wicked debtor, or the workman for a breach of contract, without any reference to the result, satisfaction or compensation, the number of thieves, swindlers, wicked debtors, and contract-breaking workmen will even be decreased by a single one? Let him answer. And even in the supposed case, if here and there a successful result for the entitled person were to be hoped for—we leave the world of criminals wholly on one side, for who among them permits himself to be restrained from the commission of an offence because he may possibly have to restore the thing obtained thereby—where is the wicked debtor, or the workman who is inclined to commit a breach of contract, who because he anticipates that the creditor or his employer will bring an action against him, abandons his serious intention not to pay, or his serious intention to break his contract,

(*a*) Page 48 of the 5th German edition; and page 42 of Mr. Ashworth's translation.

tion of your whole argument. What else, then, does the coward do who flies from the battle-field and saves his life than provide for his physical self-preservation? You see the complete contradiction into which you have landed yourself, and "a complete contradiction is alike mystifying for wise men as for fools." Into such a contradiction must one, however, fall if one perverts, like you, Mr. Professor, the nature of things, and invents a moral duty out of the instinct of self-preservation. Whither this leads you can best judge by your own example of the runaway soldier—for you will scarcely concede or wish to assert, that the soldier who flies from the battle-field, and who follows, therefore, the instinct of self-preservation, "the highest law of the whole animal world," fulfils a *moral duty*. And thus will he also, in truth, who in the eternal and ceaseless battle for existence asserts his right, and thereby defends his moral existence, obey only a command of nature, but not discharge a moral duty.

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One needs only to presuppose unimaginable things to enable one to prove everything. Let one only give Archimedes a fixed dot out of the earth, and he will immediately unhinge it. But it is our task to abide on the earth, and to find right and truth within the given natural relations.

We must hasten to an end. Just as the criminal and private law stand on a completely different footing from each other, so it is also the case with public and international law. Whilst private law is nothing else, and strives for nothing else, than the peaceful equilibrium of different private interests—and in this equilibrium, let it be constituted as it may, every individual in the State has an interest, because it is only thereby that his peaceful existence is secured—in international law, as in public law, the relative conditions of power of the parties concerned for the most part determine the form of the law; and the maintenance and vindication of a violated right, at least of an intentionally violated right, assumes here, instead of the form of a battle for right, rather that of a battle for power. Hence it would seem to be wholly inadmissible here to draw conclusions from relations of one kind for those of a different character. But there is one thing we feel ourselves particularly bound to dispute, despite the arguments of the Professor, most emphatically and prominently, namely, that, as he thinks, the vitality and vigour of the consciousness of right in the case of a violated private right stand on a parallel footing with that in the case of a violated public right. This is by no means the case. The peasant, for instance, with his tenacious and ingrained sense of ownership, who prosecutes every violation of ownership with the utmost

rigour, is mostly little aroused by the violation of a public right belonging to him, and regards it with tolerable indifference, accustomed to dance as his deputies may pipe, to whom he politely bows in the bargain; or the officer who, without the smallest deliberation, flings away his life for the sake of his outraged honour, has, as a rule, neither the sense nor understanding for matters concerning the public law, and prefers, instead of freedom of right generally, a simple military command and obedience. On the other hand, the well-to-do and educated citizen, who easily enough gets over a small loss of property, and who frequently abstains from resorting to legal proceedings which might perhaps recover the property back for him, who alike scorns to avenge his outraged honour by a duel in a battle for life or death, or only to call the insulter to account in an action for damages; it is just he who, almost in every country, stands up with the greatest resoluteness for his public rights; it is he who brooks their violation least, and who is often enough forced for their defence to suffer injustice, mortification of all kinds, fines and penalties adjudged against him, or, as a political refugee, to abandon house, home, and fatherland. He who treats most lightly the violation of a private right of property is also just the man who is most sincerely disposed to offer sacrifices and to bear burdens in the public interest; whilst the peasant, when the question touches his purse, can often scarcely be prevailed upon to contribute a *heller* (*a*) for the most pressing needs, not even for such as concern him directly, as the building and repairing of roads, to say

(*a*) A small copper coin worth about half a farthing.—TRANS.

nothing of more ideal needs, such, for instance, as schools. The former leads the way in regard to all charitable and deserving objects with a good example of free and liberal contributions; the latter keeps himself, as far as possible, aloof from them, or purchases his release from them by the meanest gifts. In short, it is precisely the peasant, with his vaunted sense of ownership, who clings and sticks only to the material—to his money—and has no care for any more ideal purposes or pursuits. Education and culture, public law and popular freedom, have certainly owed least of all to the peasant class. How shall we then agree with the assertion that it is upon the strength and force of the feeling for personal right that the higher moral possessions of a nation more or less depend? "The private law, not the State's law, is the true school for the political education of a people" (*a*), says the Professor. Possibly so. But then this school is not, at all events, to be found in the defence and assertion of personal right at any price, but in the respect of the right of another. It is this which infuses strength and courage when the existence of the nation is threatened from without, or, in consequence of the arbitrariness of the executive power, the freedom of the nation from within, to make in either case the utmost sacrifices. For it is not the selfish assertion and defence of a personal private right of the most unimportant description—which is nowhere to be found in a prominent degree, except in the lowest and most uneducated classes—but that of a high-souled and praiseworthy sense for right and legality, which consists in a permanent and con-

(*a*) Page 66 of the 5th German edition; and page 59 of Mr. Ashworth's translation.

stant *self-denial*, that educates one to the spirit of sacrifice in the general interest and for the sake of higher ideal purposes. It is this sense also, this high respect for law, which we admire, as is well known, in so high a measure in the Englishman; and it is only the Professor, again, who prefers to reverse the fact and to represent the matter in a directly contrary light, as if the energetic self-consciousness of personal right was the subject of our admiration and our emulation.

But whither this strong accentuation of the battle for personal right, the active assertion and defence of violated personal right at any cost, finally leads, no one—and that is the most wonderful feature in the whole of the Professor's exposition—no one has shown us better, no one has brought more drastically before us, than he himself. Shylock, in Shakespeare's *Merchant of Venice*, who, driven by hatred and revenge, rather than guided by a rational interest to stand by his bond, commits the most outrageous wrong by claiming the law under a sense of injured right; Michael Kolhaas, who, because he has been outraged in his right, becomes now himself a criminal, actuated by the most passionate revenge; the Corsican, who, injured in his right, thirsts after the blood of his opponent; the North American, who, in blind fury, murders a man whom he believes guilty of a supposed crime; the officer who revenges his outraged honour in the duel, or, if his opponent is not capable of a duel, simply strikes him down with a dagger: these are the examples which the Professor gives us in support of his doctrine—examples which are to exhibit to us the supremacy and the excellence of the living, active consciousness of right, that is to say, of the consciousness of personal right. But are they not exactly the sort of

examples which should have convinced him of the perniciousness and deep immorality of his doctrine, which should have shown him that where the battle for right—the defence of a personal right—ceases to be a matter of personal interest, the struggle necessarily assumes the form of a battle of PASSION, and that then it is no longer any consciousness of right but only a spirit of revenge that drives and incites one on to the battle, and that, if anywhere, it is precisely in this spirit of revenge that the sense of right and law is stifled and perishes? *Once the battle for right, so far as it is waged by individuals, is freed from the trammels of an intelligent and rational interest, there is no longer any holdfast in the confused turmoil of contending and heated passions.* It is, in truth, Nature herself which has imposed that interest as a wholesome check upon the battle for right, whose lurid rays are seen everywhere and throughout all time, and which man happily for that very reason only rarely oversteps! And so shall we also suffer no one, not even a learned Professor, to argue or cut it away from us.

Not the battle for right, but the battle against wrong, is a moral duty, must then be our watchword against that of the Professor. The defence of personal right may only so far properly and effectually engage in this battle as the interest of the entitled person requires, because otherwise it is almost necessarily converted from an act of defence of right into an act of revenge; right is no longer separated from wrong, and the battle of right against wrong is imperceptibly converted into a battle of wrong against right. But even when the defence of personal right keeps within that natural limit, it will still contribute but little on the whole to the effectual repression of a determined, intentional wrong. This is

rather only possible by means of the penal power exercised by the State, which extends also—although you seem, Mr. Professor, to have no notion of it—to the faithlessness of depositees, agents, guardians, and other persons holding offices of trust (for example, §§ 246 and 266 of the German Penal Code), and advantageously substitutes for such cases, in lieu of private penalties and infamy, public fines and imprisonments, connected with the possible loss of the rights of citizenship. Nevertheless you do not hesitate to write—"The faithless depositee or agent is no longer amongst us branded with infamy; the grossest knavery, so long as it understands how to avoid skilfully the criminal law (where is not that the case, but the law, with its threatening penalties, is surely still there and in force, and what more do you wish?), escapes at the present day completely free and without punishment" (*a*).

Just as, however, it is more and more recognised that while care and nursing may in truth effect a healing of the diseased human body in individual cases, but cannot itself cause a diminution of the causes of disease, and just as it is recognised that it needs rather for that purpose precautionary sanitary measures for the maintenance of health, so it is also in the province of intellectual and moral health. The penal power exercised by the State, however necessary it may be, will no doubt prevent any powerful increase and growth of wrong, but will scarcely produce a material decrease in the number of offences. For this purpose not so much punitive as rather preventive means are required, and these are good education, good morality, and good example. The

(*a*) Page 86 of the 5th German edition; and page 77 of Mr. Ashworth's translation.

class of promoters (*Gründer* (*a*)) has not forsooth produced such demoralising results, because they readily sacrificed their own rights of property, but because, on the contrary, actuated by avarice—which ought not to be confounded with the instinct of acquisition—they enriched themselves without suffering any punishment by means of swindling, or by means of the unlawful gains of others; and thus, by their improved social position, gave the casting voice for disrespect of right, law and morality, and found imitators only too quickly amongst all the remaining classes from the highest to the lowest.

Thus, then, on our part, we set in opposition to the maxim, "In battle shalt thou find thy right," this other maxim: "Respect the right of others even where thy own is violated." To impress this respect for right and law upon our children from their earliest youth upwards, that they may be a constant example to the lower and less-educated classes of society, that is our task, and that is our moral duty! We shall then have done the best in our power for battling with wrong, and for the decrease of the latter.

(*a*) This word is now usually employed in a contemptuous sense, which is said to be due to the fact that in Germany the promoters of joint stock companies have earned but little public favor.—TRANS.

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